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Supreme Court, U.S.
FILED

No. 981125 JAN 4 1999

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CITY OF PERU, an Illinois Home Rule Municipal Corporation,

Respondent,

vs.

DONALD E. KOTECKI and TRACY L. KOTECKI,

Petitioners,

and

EUREKA SAVINGS BANK; UNKNOWN HEIRS AT LAW OR DEVISEES OF WILLIAM A. EAKIN, and UNKNOWN OWNERS AND NONRECORD CLAIMANTS,

Defendants.

On Petition for Writ of Certiorari from the Appellate Court of Illinois, Third Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Business District Development and Redevelopment Statute, found in Illinois Compiled Statutes 1994, 65 ILCS 5/11-74.3, is unconstitutional because it fails to define any standards or criteria for municipal authorities to apply. Whether City of Peru Ordinance No. 2904 is unconstitutional because of the identical defects suffered by 65 ILCS 5/11-74.3.

2. Whether City of Peru Ordinance No. 2915 is invalid and void because of the City's failure to comply with its self-imposed requirement that the ordinance be published in pamphlet form.

3. Whether defendants' property was condemned by the City of Peru to permit the expansion of a private alley for semi-trailers to deliver merchandise to private business establishments, a private purpose, not a public purpose.

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ORDERS AND OPINIONS ISSUED IN COURTS BELOW

On June 27, 1995, the plaintiff filed a two-count complaint for condemnation against defendants in the Circuit Court of LaSalle County, Illinois. A copy of the complaint appears in Section I of the Appendix. Defendants filed a traverse and motion to dismiss plaintiff's complaint. The trial court granted defendants' motion as to Count II,

denied the motion as to Count I, and proceeded to trial on Count I. At the conclusion of the case, the trial court ruled in favor of plaintiff and defendants unsuccessfully moved for reconsideration of its denial of their traverse and motion to dismiss. A copy of the written order, together with a copy of the transcript of the court's rulings appear in Sections L and M of the Appendix.

The Illinois Appellate Court, Third Judicial District, reviewed the action and on May 27, 1998 issued an unpublished opinion affirming the decision of trial court. Defendants requested a rehearing and on July 13, 1998, the appellate court denied the petition. The text of the May 27, 1998 and July 13, 1998 orders has been reprinted in Sections O and P, respectively, of the Appendix.

The Illinois Supreme Court on October 7, 1998, entered an order denying defendants' Petition for Leave to Appeal and issued its mandate on October 28, 1998. A copy of said order, which has yet to be published, appears in Section Q of the Appendix hereto.

GROUNDS FOR UNITED STATES SUPREME COURT TO EXERCISE ITS JURISDICTION IN CASE

This appeal arises from the denial by the Illinois Supreme Court on October 7, 1998, of defendant's Petition for Leave to Appeal. The Illinois Appellate Court, in an unpublished opinion on May 27, 1998, affirmed the decision of the trial judge which granted the plaintiff's right to condemn.

The Illinois Appellate Court misunderstood the constitutional questions raised in the trial court as well as in the Appellate Court. This court has jurisdiction to accept this appeal because of the fact that the Illinois Supreme Court, in exercising its discretion under Rule 315(c) of the *Illinois Supreme Court Rules*, declined to accept the defendants' Petition for Leave to Appeal. Defendants have now exhausted the remedies available for review under Illinois procedural rules. This case is similar to *Chicago & Eastern Illinois Railroad Co. v. Industrial Commission*, 284 U.S. 296, where this Court held certiorari from the Circuit Court was proper after the Illinois Supreme Court declined to review that case.

STATUTES AND REGULATIONS INVOLVED

1. Rule 10.1.(c) of the *Rules of Practice of the Supreme Court of the United States*, provides:

> 1. A review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> * * *
>
> (b) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be decided by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

2. 65 ILCS 5/11-74.2, appears in Section D of Appendix;
3. 65 ILCS 5/11-74.3, appears in Section E of Appendix;
4. 65 ILCS 5/11-61-1 provides as follows:

> 5/11-61-1. **Acquirement of property**
>
> § 11-61-1. The corporate authorities of each municipality may exercise the right of eminent domain by condemnation proceedings in conformity with the provisions of the constitution and statues of the State of Illinois for the acquirement of property useful, advantageous or desirable for municipal purposes or public welfare including property in unincorporated areas outside of but adjacent and contiguous to the municipality where required for street or highway purposes by the municipality.

5. Ordinance No. 2904 of the City of Peru, appears in Section F of Appendix;
6. Ordinance No. 2915 of the City of Peru, appears in Section G of Appendix; and
7. Ordinance No. 3238 of the City of Peru, appears in Section H of Appendix.

STATEMENT OF THE CASE

Plaintiff commenced a two-count action in the Circuit Court of LaSalle County against defendants (Section I of Appendix) who were land owners within the plaintiff's boundaries. In Count II, the plaintiff contended it could, under its home rule powers, exercise the power of eminent domain and condemn defendants' real estate for the purpose of expanding a municipal parking lot. Defendants filed a traverse and motion to dismiss plaintiff's complaint alleging, among other things, that the ordinances and statute on which plaintiff relied to condemn defendants' property were unconstitutional. The trial court allowed the motion as to Count II of plaintiff's complaint and denied the motion as to Count I (Section J of Appendix). The cause proceeded to a hearing on Count I and the trial court found in favor of the plaintiff as to Count I of its complaint.

In endeavoring to exercise the power of eminent domain, plaintiff alleged 65 ILCS 5/11-74.3 authorized the commencement of this condemnation action. However, 65 ILCS 5/11-74.3 clearly suffers the constitutional deficiency of being vague and overly broad and, therefore, void of any recognizable standards which would protect the due process rights of these defendants, or any other citizen of the city, all of which was brought to the trial court's attention in the various

motions filed by defendants. Furthermore, no statute authorizes any municipality to condemn property for "redevelopment."

Defendants filed a motion to reconsider the trial court's ruling which was denied and an appeal to the Illinois Appellate Court, Third District, followed. In the briefs filed with that court, defendants called to the court's attention the unconstitutionality of plaintiff's ordinances and the state statute citing *City of Wheaton v. Sandberg* (2d Dist. 1991), 215 Ill.App.3d 220, 158 Ill.Dec. 584, 574 N.E.2d 697, as authority. The appellate court, in its opinion, stated that the *City of Wheaton* case was not "persuasive authority in the instant case." Defendants' Petition for Leave to Appeal to the Illinois Supreme Court, which also raised the constitutional question of plaintiff's ordinances and the state statute, was denied.

The constitutional flaw in 65 ILCS 5/11-74.3 becomes evident when it is compared with 65 ILCS 5/11-74.2, the preceding statutory division. Section 5/11-74.2, entitled, "Commercial Renewal and Redevelopment Areas," contains definitions in § 5/11-74.2-2 for the terms used in the Act, and details the procedures to be followed prior to condemning an individual's real estate. Furthermore, § 5/11-74.2-3 delineates the procedure for the corporate authorities to undertake a study and survey for determining whether their municipality contains any commercial

blight or conservation areas, § 5/11-74.2-4 prescribes that notice be provided to interested parties, § 5/11-74.2-5 requires a public hearing on redevelopment plans, § 5/11-74.2-6 specifies a scheme for formulation, publication, and public inspection of a redevelopment plan, and § 5/11-74.2-7 permits individuals aggrieved by the actions undertaken by municipal officials to seek administrative review of the redevelopment plan.

To the contrary, no corresponding definitions are set forth in 65 ILCS 5/11-74.3, nor does this division, designated as the "Business District Development and Redevelopment Act," delineate any procedure which a municipal entity must follow in order to insure the due process rights of its citizens will be safeguarded from governmental intrusion.

Moreover, the trial and appellate courts were misinformed by plaintiff with regard to the requirement that Ordinance No. 2915 be published in pamphlet form prior to becoming effective. Specifically, both lower courts failed to recognize that the decision in *In re Application of the County Collector of Kane County, People ex rel. Critton v. American National Bank and Trust Co.* (1989), 132 Ill.2d 64, 138 Ill.Dec. 138, 547 N.E.2d 107, issued by the Illinois Supreme Court, held that when the ordinance itself imposes that it be published, then actual publication of ordinances enacted by a municipal corporation's governing body is

a prerequisite to enforcing the ordinance. Publication of a municipality's ordinance is the vehicle by which citizens are informed as to the legal status of their civil liberties and property rights within the jurisdictional boundaries of the local governmental unit, as well as, being advised about the ramifications of their actions.

Furthermore, because of the vagueness, indefiniteness, uncertainty and failure of the ordinances and statutes in question to set forth the standards and procedures necessary for the taking of property, the defendants in the instant case do not know how their property can be "chosen," and therefore their due process guarantees have been violated. The validity and constitutionality of a statute is determined by its provisions, not by its silence. What defendants do know is why their property was chosen. Defendants' property was chosen to facilitate deliveries to two private business properties abutting a 12 foot private alley adjacent to a municipal parking lot. The sole purpose of the condemnation suit was for private gain to private businesses and not for any public purpose.

Under the statutes of this state, municipalities do have the power of eminent domain; however, such power must be exercised for the public use, health, safety or welfare for the objective intended. A statute granting the power of eminent domain must be strictly construed,

because it is in derogation of the common law. The fact that a municipality has the power to take private property does not exempt the municipality from exercising those powers with a view of preventing hardships and abuses.

The taking of property for a public use or purpose is a drastic interference with the private rights of property. Consequently, all property owners have the right to demand that they be governed by laws that do not discriminate or fail to contain specific and uniform standards in order that the owners and their property are not singled out to be regulated by a different standard from that which is applied to similar property within the municipality. Laws which are palpably arbitrary and unreasonably harmful, unjustly interfere with private rights.

A statute which requires that different means and methods be employed in taking property from certain property owners, or which fails to operate uniformly on all properties similarly situated, violates the due process and equal protection rights of each property owner and is clearly a violation of the constitutional guarantees of both the Federal and State Constitutions. A statute which is constitutional on its face may be grossly unconstitutional in its operation or application.

Statutes must be drafted with specific definiteness. Vagueness and

indefiniteness should be avoided because the average person is not placed on notice as to exactly when or how the statute will be utilized. The General Assembly cannot, on the pretense that the passage of a particular statute which allows municipalities to exercise their eminent domain powers but fails to specify the standards to be followed, create a constitutional permissible power. To do so violates a landowner's right to due process because the reason for the taking is uncertain and problematic. Statutes and ordinances, especially those depriving individuals of their property rights, should be drafted with extreme caution to avoid an unconstitutional result.

Courts have the duty to interpret a statute as it stands. They do not have the authority to rewrite a statute. Thus, the courts may not alter, amend or modify a statute; the amendment of a statute is a legislative, not a judicial, function. Accordingly, courts have no right to read or put into a statute words or provisions which are not found therein, either by express inclusion or by fair implication. They may not incorporate in a statute provisions not expressed in the statute itself, and they may not annex new provisions or substitute different ones, or interject provisions not found in the statute, however desirable or beneficial they may be.

This issue is extremely important because there are no published

opinions interpreting the validity of 65 ILCS 5/11-74.3. Because this statute affects all municipalities in the State of Illinois, a determination by this court is needed for the protection of privately owned real and personal property in business districts of all municipalities within the State of Illinois.

DEFENDANTS' PRESENTATION AND ARGUMENT IN ILLINOIS TRIAL AND APPELLATE COURTS AS TO APPLICATION OF FEDERAL CONSTITUTIONAL PRINCIPLES AND LAW.

In an attempt to create a business redevelopment area and to acquire the defendants' real estate, the Mayor of the City of Peru, Illinois, without prior authorization by resolution of the council, in early 1991 personally engaged a private architectural firm, Pekham, Guyon, Albers and Viets, Inc. (PGAV), from St. Louis, Missouri, to do a survey of plaintiff's downtown area. An important factor impacting upon the actions undertaken by plaintiff arises from the fact that this architectural firm completed its design proposals in April of 1991, before any redevelopment commission was created. The ordinance which established the redevelopment commission was not adopted until July 29, 1991.

All of the downtown redevelopment plans submitted by PGAV pre-dated the formation of the redevelopment commission and the adoption

of Ordinance No. 2915. Ordinance No. 2915 included a publication requirement which provided as follows:

> SECTION 5: This ordinance shall be effective immediately from and after its passage and approval and shall be published in pamphlet form.

Plaintiff thus imposed upon itself the requirement that the ordinance would not become effective until after it had been published in pamphlet form.

Defendants in their motion to traverse, informed the trial court that Ordinance No. 2915, the basis of this condemnation action, had not been published. The plaintiff offered no proof as to the date said ordinance had been published in pamphlet form. The certification by the City Clerk for the City of Peru only shows the date the ordinance was passed, adopted and approved; however, it fails to contain the date of publication in pamphlet form.

The commission chairman admitted under oath that all the downtown redevelopment plans submitted by the PGAV firm pre-dated its formation. William Etzenbach, the City Engineer, knew of no legislative ordinance or resolution authorizing either the architects of the PGAV firm or Chamlin & Associates, his company, to redesign the parking lot in question. Moreover, even Donald L. Baker, the Mayor of the City of Peru, Illinois, conceded no formal agreements had been

made for Chamlin & Associates to propose any parking lot redesign.

The city engineer, stated under oath that his firm was verbally requested to draw plans on the reconstruction of the public parking lot. Jody Koehler, Chairman of the Development Commission, stated that the commission did not conduct any public hearings with regard to changing the downtown redevelopment plan. The Mayor testified that no one from PGAV ever explained to the council how they defined a conversation area. The Mayor further testified PGAV never discussed with the city council how they arrived at the definitions of the 14 classifications contained in their report.

Allan Zaniecki, a lieutenant with the Peru Police Department, testified that from the opening of the municipal parking lot in question there has never been a pedestrian accident and no personal injury to an occupant of any vehicle as a result of an accident in the parking lot. Further, Lt. Zaniecki was never called to testify before the planning commission or the development commission.

Donald Kowalczyk, Peru Superintendent of Public Works, testified his duties are to maintain all municipal parking lots in the city. In all of his years in office, he has never received a written complaint regarding semi-tractors delivering or picking up merchandise in the 12 foot private alley.

David Potthoff, Alderman for the City of Peru, testified that the city council had no input in the selection of PGAV and that PGAV never appeared before the Council to discuss how they obtained the information that was placed in their plan. Mr. Potthoff further testified that the city council never received any information with regard to any safety problem in the private alley or that anyone had suffered an injury in any manner. Mr. Potthoff was of the opinion that the city should not be involved in the redesign of the parking lot. Alderman Potthoff was of the opinion that additional parking was not needed and that expending money to condemn the defendants' property was a useless project.

All of this evidence serves to impeach the plaintiff's position that it was necessary to take the defendants' property for a public purpose. Counsel for plaintiff admitted that the statute in question does not set forth any standards and that condemning defendants' property was solely to reconfigure the parking lot by making it possible for trucks to service the businesses (R.P. Vol. #4, p. 21).

The language in Section 5 of Ordinance No. 2915 mandates that the plaintiff's publication of the ordinance in pamphlet form is a condition precedent to the legislation becoming effective. In accordance with the decision in *In re Application of the County Collector of Kane County,*

People ex rel. Critton v. American National Bank and Trust Co., supra, plaintiff bears the burden of proving Ordinance No. 2915 was effective before this litigation was commenced.

A law vesting discretionary power in an administrative officer without properly defining the terms under which his discretion is to be exercised is void as an unlawful delegation of legislative power. (*Krol v. County of Will* (1968), 38 Ill.2d 587, 233 N.E.2d 417.) The PGAV firm, hired by the Mayor without any authority from the city council to redesign the parking lot, was an unconstitutional act on the part of the Mayor to hire a private corporation to perform a legislative function.

Defendants filed a motion for summary judgment on the basis that the ordinances under which plaintiff sought to condemn their property were constitutionally flawed. The motion for summary judgment was denied. The cause proceeded to a hearing on the merits. At the close of plaintiff's case, defendants moved for a directed verdict for defendants on all counts. The trial court granted the motion as to Count II and denied the defense motion as to Count I. Defendants filed a motion for reconsideration. Defendants drew the court's attention to the fact that plaintiff's Ordinance No. 2915 had not been properly published in pamphlet form and was therefore void. The trial court denied the motion to reconsider. At the close of all the evidence, defendants

moved for a directed verdict as to Count I. The trial court denied defendants' motion and ruled in favor of plaintiff. Defendants appealed and on May 27, 1998, the appellate court filed its opinion. The court gave no consideration to the *Kane County* case where our Supreme Court held the validity of an ordinance passed by a municipality but which was never published in accordance with the mandate of the ordinance, was ineffective.

A.

THE APPELLATE COURT FAILED TO APPLY CONSTITUTIONAL STANDARDS TO DETERMINE WHETHER ORDINANCE NO. 2904 AND 65 ILCS 5/11-74.3 ARE UNCONSTITUTIONAL.

Ordinance No. 2904. Ordinance No. 2904 entitled, "An Ordinance Creating A Business District And Redevelopment Commission For The City of Peru, Illinois," merely established a redevelopment commission. Nowhere in the ordinance is there an express grant to the commission to exercise the power of eminent domain. In fact, there is reference to "corporate powers" which are incomplete, vague, indefinite, uncertain and totally unrelated to the function of the commission. Consequently, people of ordinary intelligence must guess and speculate as to the enforcement or application of this ordinance.

Local government officials and authorities are obligated to protect the property rights of the citizens in their communities. However, this

opinion opens the door to allow municipal officials to acquire real estate without stating any basis for the acquisition and without following any standards or procedures.

65 ILCS 5/11-74.3 is unconstitutional because it fails to establish specific procedures or standards to protect the constitutional due process rights of property owners regarding eminent domain proceedings involving ownership of real property.

Further, plaintiff relies upon Ordinances No. 2904 and No. 2915 as authority to condemn. Ordinance No. 2904 is unconstitutional because it fails to establish any standards for the taking of private property by the plaintiff under the power of eminent domain. Ordinance No. 2915 is void and of no effect because the plaintiff failed to publish the ordinance in pamphlet form as required by its own mandate that it be published before it would become effective.

Both the trial and appellate courts rejected defendants' contention that *City of Wheaton v. Sandberg, supra,* should be applied and plaintiff's Ordinance No. 2904 be declared unconstitutional.

Strict construction must be applied for a condemnation ordinance, and a court should consider the reasons for the law, the evil to be remedied, and the objects and purposes to be obtained. 65 ILCS 5/11-61-1, which authorizes condemnation for municipal purposes, does not set

forth "redevelopment" as a municipal purpose (*Village of Skokie v. Gianoulis* (1994), 260 Ill.App.3d 287, 198 Ill.Dec. 47, 632 N.E.2d 106). In *Village of Skokie* the Appellate Court, First District, explained at page 52 of the Illinois Decisions:

> It is well established in Illinois that laws confirming the authority to take private property by exercising the power of eminent domain must be strictly construed (*Department of Public Works and Buildings v. Keller* (1975), 61 Ill.2d 320, 335 N.E.2d 443) in order to protect land owner's property rights. (*Village of Long Grove v. First National Bank of Lake Forrest* (1987), 164 Ill.App.3d 253, 517 N.E.2d 729, 115 Ill.Dec. 318. A statutory grant of eminent domain power can only be exercised in the manner authorized by the statute. (*Department of Public Works and Buildings v. Ells* (1962), 23 Ill.2d 619, 179 N.E.2d 679.) To pass constitutional scrutiny, the statute must also contain definite standards for municipal authorities to apply. Thus, the language of the statute or ordinance may not be so incomplete, vague, indefinite or uncertain that a property owner could not be certain whether his property is at risk of being condemned. (*City of Wheaton v. Sandberg* (1991), 215 Ill.App.3d 220, 158 Ill.Dec. 584, 574 N.E.2d 697. *(Emphasis added.)*

Because 65 ILCS, Division 61, does not include "redevelopment" as a purpose for taking, plaintiff must rely on its ordinance to derive the power to take property for redevelopment. However, no legal ordinance exists granting plaintiff the right to take private property by eminent domain proceedings. Nowhere in Ordinance No. 3238, the ordinance plaintiff relies upon for the acquisition of defendants' property, are there any standards to be applied in a condemnation proceeding. Therefore, all ordinances cited by plaintiff as authority to condemn are invalid.

The trial court should have granted defendants' motion and dismissed Count I of plaintiff's complaint.

The appellate court attempted to distinguish *City of Wheaton* from the instant case, claiming that in *Wheaton* that city had "provided for its own criteria for determining whether an area was blighted including the existence of vacancies in all or part of a building." The statement by the appellate court that Wheaton had "provided for its own criteria" is meaningless when considering that plaintiff's Ordinance No. 2904 contains "no standards" for determining whether an area is blighted and property within that area is subject to being condemned.

The unpublished opinion by the Third District Appellate Court is directly opposite from the published Third District Appellate Court opinion of *Union National Bank & Trust Co. of Joliet v. Village of New Lenox* (3d Dist. 1987), 152 Ill.App.3d 919, 922, 105 Ill.Dec. 875, 878, 505 N.E.2d 1, 3, where Justice Heiple explained:

> An ordinance is unconstitutionally vague when men of common intelligence must necessarily guess at its meaning. (*Broadrick v. Oklahoma* (1973), 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830; *Redemske v. Village of Romeoville* (3rd Dist., 1980), 35 Ill.App.3d 286, 40 Ill.Dec. 596, 406 N.E.2d 602.) In other words, the ordinary person must be capable of appreciating, from the language of the ordinance or statute, how he will be affected by its operation. 85 Ill.App.3d 286, 40 Ill.Dec. 596, 406 N.E.2d 602
>
> We also note that the ordinance is unconstitutionally vague because it does not prescribe any standards or criteria upon which

the village can determine whether a proposed use, that is not specifically listed, is permitted, prohibited or special. . . . No one could tell what is similar and compatible to an incomplete list of permitted uses. Therefore, we agree that the ordinance is unconstitutionally vague. *(Emphasis added.)*

The appellate court overlooked the testimony of witness Jody Koehler, who chaired the Peru Plan Commission, when he conceded the plan submitted by PGAV was not adopted as an ordinance.

[MR. OLIVERO]: Did you follow the plan to the letter of the plan as it was outlined as to what you should do as a Commission?
[MR. KOEHLER]: We did not. The plan is a guideline, as an example. *(Emphasis added.)*

Thus, no standards were ever adopted by the Peru Redevelopment Commission advising a property owner of the likelihood his property would be taken under an eminent domain proceeding.

Also, witness Jody Koehler, after testifying the plan neither had the force or effect of law but was only guidance, testified the redevelopment commission had never adopted any guidelines property owners might attempt to adhere to in order to avoid having their property being taken by an eminent domain proceeding.

[MR. OLIVERO]: As a Commission, did the Commission ever adopt any definitions or guidelines as to the basis that would put a property owner on notice that if he doesn't comply with these one, two, three, four, five steps that his property is subject to be condemned for redevelopment?
[MR. KOEHLER]: Repeat that, please.
THE COURT: He wants to know if you ever established any guidelines for what buildings you were going to condemn.

THE WITNESS: No. *(Emphasis added.)*

If the Chairman of the Redevelopment Commission could not explain the standards by which certain properties would be selected to be taken by eminent domain, then Ordinance No. 2904 should be found to be unconstitutionally vague. When people of common intelligence must necessarily guess at the meaning of an ordinance, or when an ordinance contains no standards upon which a property owner can determine when or why his property will be taken, the ordinance is unconstitutional because it is vague and uncertain and vests sole discretion in a redevelopment commission. To hold otherwise would be an unlawful delegation of legislative power to an administrative body without properly defining the terms under which their discretion is to be exercised. (*Krol v. County of Will, supra.*)

B.

THE APPELLATE COURT FAILED TO APPLY THE HOLDING IN *COUNTY COLLECTOR OF KANE COUNTY* REQUIRING PUBLICATION OF ORDINANCE NO. 2915 PRIOR TO IT BECOMING EFFECTIVE.

The Illinois Appellate Court stated, "[W]e conclude that section 5 of the ordinance does not require publication as a condition precedent which must be met prior to the ordinance becoming effective." That ruling completely ignored the directives given by the Illinois Supreme

Court in *In re Application of the County Collector of Kane County, People ex rel. Critton v. American National Bank and Trust Co.* (1989), 132 Ill.2d 64, 138 Ill.Dec. 138, 547 N.E.2d 107.

The ordinance considered in *Kane County* specified, "[T]his ordinance shall be in full force and effect from and after its final passage, approval, recording and publication and lapse of time prescribed by law." *(Emphasis supplied.) Id.* at 71, 138 Ill.Dec. at 141, 547 N.E.2d at 110. This language, considered in the *Kane County* case, is closely replicated in Section 5 of the plaintiff's Ordinance No. 2915 in this case which stated, "[T]his Ordinance shall be effective immediately from and after its passage and approval and shall be published in pamphlet form." *(Emphasis added.)* However, despite the substantial similarity in the language between these municipal ordinances, the Illinois Appellate Court neither applied, nor considered the holding in the *Kane County* decision.

In *Kane County*, certain property owners living within the city limits of Aurora objected to payment of their real estate taxes and alleged that the city's tax levy against their property was invalid because the city failed to publish their appropriation ordinance.

The Illinois Supreme Court in *Kane County* stated at page 100 of the

Northeastern Reporter Second Series:

> In construing a statute or an ordinance, a court should not adopt a construction which rendered words or phrases in a statute superfluous. * * * The city imposed this requirement on itself [publication], and we must attempt to give meaning to the words and determine what law is referred in regard to publication. * * * The plain meaning of section 2-28, which the appropriation ordinance adopts, is that the appropriation ordinance must be published 10 days before it will become effective. Having admittedly failed to do this, the ordinance was not in effect at the time that the tax levy ordinance was passed. * * * The city's failure to comply with the mandatory publication and time lapse provisions of its appropriation ordinance rendered the ordinance ineffective at the time the city sought to pass its levy ordinance.

Plaintiff argues that its home rule powers immunized it from adhering to the statutory requirements expressly imposed upon plaintiff. The *Kane County* decision stated otherwise. The appellate and trial courts neglected to adhere to the decision in *Kane County* and the failure to apply the holding to plaintiff's ordinance was error.

Despite the mandate imposed in the ordinance that it be published in pamphlet form, the plaintiff failed to publish the ordinance. The Supreme Court in *Kane County* held that the failure to comply with the mandatory publication rendered the ordinance ineffective.

The Second District Appellate Court decision *In re Application of Anderson* (2d Dist. 1990), 194 Ill.App.3d 414, 420-1, 141 Ill.Dec. 413, 417-18, 551 N.E.2d 406, 410-11, also serves as an example. In *Anderson*, the appellate court began its analysis by stating:

We address first the issue of whether the City properly enacted a valid appropriation ordinance pursuant to its home rule powers then in effect on August 7, 1978. We are guided by this court's recent decision in *In re Application of the County Collector of Kane County* (1988), 172 Ill.App.3d 897, 122 Ill.Dec. 769, 527 N.E.2d 141, *aff'd* (1989), 132 Ill.2d 64, 138 Ill.Dec. 138, 547 N.E.2d 107. We believe that the appropriation ordinance was not properly enacted on August 7, 1978, and was void as to the present objector because the City failed to observe the statutes and ordinances in force at the time of passage of this ordinance on August 7, 1978.

A municipality is bound by the mandatory provisions of its own existing ordinances and of the statutory procedures in effect at the time of passage of its appropriation ordinance. (*County Collector of Kane County*, 172 Ill.App.3d at 904, 122 Ill.Dec. 769, 527 N.E.2d 141.) On August 7, when the City council attempted to invoke its home rule powers in derogation of section 8-2-9 of the Municipal Code, which requires that an appropriation ordinance be passed within the first quarter of each fiscal year, the City council specified that its ordinance would not take effect until after its passage, approval, and publication in pamphlet form and pursuant to the Illinois Municipal Code. The ordinance was not published until August 22, 1978, and, therefore, the home rule power invoked was not in force until that date. Once the City imposed a publication and time lapse requirement upon itself, the City could not avoid it. (*County Collector of Kane County*, 172 Ill.App.3d at 902-3, 122 Ill.Dec. 769, 527 N.E.2d 141.)

Because plaintiff failed to properly publish Ordinance No. 2915, the ordinance is ineffective. The trial court erred in failing to dismiss Count I of plaintiff's complaint at the close of all the evidence. The holding in *Kane County* requires plaintiff's condemnation action be dismissed.

CONCLUSION

The ordinance on which plaintiff relies as the authority for this condemnation action was neither properly published nor enacted. Therefore, plaintiff lacks the requisite statutory authority to acquire the real estate owned by defendants. A municipality's adoption of an ordinance without proper publication prevents the legislation from becoming effective.

The trial and appellate courts ignored the evidence presented by defendants through the testimony of the Mayor, the Chairman of the Peru Plan Commission, the Peru Public Works Director, Peru City Engineer, City Alderman and Peru Police Department, and failed to recognize that no ordinance was ever adopted to determine whether or not property would be condemned, defining for citizens what standards would be employed in selecting real estate for condemnation. Because neither Ordinance No. 2904, nor Ordinance No. 2915, contain an expression of such standards, both ordinances should have been declared unconstitutional. Ordinance No. 2904 is so vague, indefinite and uncertain that no court is able, by accepted rules of construction, to determine with any reasonable degree of certainty, what was intended. Therefore, it must be declared unconstitutional and void. (See *City of Wheaton v. Sandberg, supra.)*

65 ILCS 5/11-61-1 which authorizes condemnation for municipal purposes, does not set forth standards for "redevelopment" as a municipal purpose (*Village of Skokie v. Gianoulis, supra).* Because the statute does not include "redevelopment" as a purpose for taking, plaintiff must rely upon its own ordinance in order to derive the power to take property for redevelopment. Plaintiff does not have an ordinance granting plaintiff the right to take private property by condemnation. Ordinance No. 2904 not only is unconstitutional and vague, it is ineffective and void because plaintiff has no condemnation ordinance (*Village of Skokie, supra*).

The May 27, 1998 decision from the Illinois Appellate Court, Third District, should be reversed in light of the applicable authority established by case law.

Respectfully submitted,

LOUIS E. OLIVERO & ASSOCIATES, Attorneys for Defendants DONALD E. KOTECKI and TRACY L. KOTECKI

By_____
Louis E. Olivero

APPENDIX

A.

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B.

Constitution of the United States, Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C.

Constitution of the State of Illinois, Article I, Section 2

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

D.

65 ILCS 5/11-74.2-2. Definitions

§11-74.2-2. As used in this Act unless the context requires otherwise:

(a) "Real property" means lands, lands under water, structures, and any and all easements, franchises and incorporeal hereditaments, estates and rights, legal and equitable, including terms for years and liens by way of judgment, mortgage or otherwise.

(b) "Commercial blight area" or "blight area" means any improved or vacant area of not less in the aggregate that 2 acres located within the territorial limits of a municipality where, if improved, industrial, because of a combination of 5 or more of the following factors: age; dilapidation; obsolescence; deterioration; illegal use of individual structures; presence of structures below minimum code standards; excessive vacancies; overcrowding of structures and community facilities; lack of ventilation, light or sanitary facilities; inadequate utilities; or excessive land coverage; deleterious land use or layout; depreciation or lack of physical maintenance; lack of community planning, are detrimental to the sound growth or the area is impaired by, (1) a combination of 2 or more of the following factors: obsolete platting of the vacant land; diversity of ownership of such land; tax and special assessment delinquencies on such land; deterioration of structures or site improvements in neighboring areas to the vacant land, or (2) the area immediately prior to becoming vacant qualified as a blighted improved area.

(c) "Commercial project" means any building or buildings or building addition or other structures to be newly constructed, renovated or improved and suitable for use by a commercial enterprise or an entity engaged in providing housing and ancillary services, and includes the sites and other rights in the land on which such buildings or structures are located.

(d) "Commercial conservation area: or "conservation area" means any area located within the territorial limits of the municipality, of not less, in the aggregate, than 2 acres in which 50% or more of the structures have an age of 35 years or more. Such an area is not

yet a blight area but because of a combination of 3 or more of the following factors: dilapidation; obsolescence; deterioration; illegal use of individual structures; presence of structures below minimum code standards; abandonment; excessive vacancies; overcrowding of structures and community facilities; lack of ventilation, light or sanitary facilities; inadequate utilities, excessive land coverage; deleterious land use or layout; depreciation of physical maintenance; or lack of community planning, is detrimental to the public safety, health, morals or welfare and such an area may become a blight area.

(e) "Commercial redevelopment plan" or "redevelopment plan" means the comprehensive program for the clearing or rehabilitation and physical development of a commercial blight or conservation area, and includes an analysis and projection of the steps necessary for the elimination or rehabilitation of a commercial blight or conservation area and the protection of adjacent area, and all administrative, funding and financial details and proposals necessary to effectuate the plan.

(f) "Redevelopment area' means the blighted or conservation area of not less in the aggregate than 2 acres, to be developed in accordance with the redevelopment plan.

E.

65 ILCS 5/11-74.3-3. Powers of corporate authorities

§ 11-74.3-3. In carrying out a business district development or redevelopment plan, the corporate authorities of each municipality shall have the following power:

(1) To approve all development and redevelopment proposals for a business district.

(2) To exercise the use of eminent domain for the acquisition of real and personal property for the purpose of a development or redevelopment project.

(3) To acquire, manage, coney or otherwise dispose of real and personal property acquired pursuant to the provisions of a development or redevelopment plan.

(4) To apply for and accept capital grants and loans from the United States and the State of Illinois, or any instrumentality of the United States or the State, for business district development and redevelopment.

(5) To borrow funds as it may be deemed necessary for the purpose of business district development and redevelopment, and in this connection issue such obligation or revenue bonds as it shall be deemed necessary, subject to applicable statutory limitations.

(6) To enter into contracts with any public o private agency or person.

(7) To sell, lease, trade or improve such real property as may be acquired in connection with business district development and redevelopment plans.

(8) To employ all such persons as may be necessary for the planning, administration and implementation of business district plans.

(9) To expend such public funds as may be necessary for the planning, execution and implementation of the business district plans.

(10) To establish by ordinance or resolution procedures for the planning, execution and implementation of business district plans.

(11) To create a Business District Development and Redevelopment Commission to act as agent for the municipality for the purposes of business district development and redevelopment.

F.

ORDINANCE NO. 2904

AN ORDINANCE CREATING A BUSINESS DISTRICT DEVELOPMENT AND REDEVELOPMENT COMMISSION FOR THE CITY OF PERU ILLINOIS

WHEREAS, the economic vitality of certain business districts within the City of Peru, Illinois, (hereinafter "City") are becoming threatened by the progressive and advanced deterioration of many structures which results in decline in business activity in those business districts so affected; and

WHEREAS, certain business districts of the City may become blighted if the decline in the use and condition of structures in said business districts are not checked; and

WHEREAS, it is essential to the economic and social welfare of the City that certain business districts be maintained and revitalized by assuring opportunities for development and redevelopment by attracting sound and stable commercial growth; and

WHEREAS, the economic success of the City has been largely the result of the substantial sales tax revenues the City receives and revitalized business districts are essential to maintain and increase those sales tax revenues to the City; and

WHEREAS, the preparation, adoption, and implementation of a comprehensive plan for certain business districts is advisable; and

WHEREAS, the development and/or redevelopment of business districts a-re matters pertaining to the government and affairs of the City, are proper public purposes, and are in the interest of the public health, safety, and welfare of the City; and

WHEREAS, it is advisable to create a Business District Development and Redevelopment Commission to act as agent for the City for purposes of the development and redevelopment of certain business districts within the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF PERU, LASALLE COUNTY, ILLINOIS, A HOME RULE MUNICIPALITY, AS FOLLOWS:

SECTION 1: Recitals. The City Council finds as facts the recitals hereinbefore set forth.

SECTION 2: Creation of Redevelopment Commission. There is hereby created a Business District Development and Redevelopment Commission (hereinafter "Redevelopment Commission") to assist the City in the development and redevelopment of certain business districts within the City which business districts are to be defined and determined by the Redevelopment commission and approved by the City Council of the City.

SECTION 3: Composition of Redevelopment Commission. The Redevelopment Commission shall consist of seven (7) members to be appointed by the Mayor with the majority approval of the City Council. Those citizens appointed. by the Mayor shall be appointed for three (3) year terms to be served from the date of appointment and shall continue until a successor has been duly appointed and approved. Members of the Redevelopment Commission shall serve without pay, but may be reimbursed for expenses actually incurred in performing duties for the Redevelopment commission. Members shall be eligible to succeed themselves and any member may be dismissed by the Mayor for failure to attend three (3) consecutive meetings or for failure to attend more than one-third (1/3) the meetings held in any one year period. The Mayor shall appoint the Chairman of the Redevelopment Commission. If action by the Redevelopment Commission is approved by a majority of the members present, it shall be deemed the action of the Redevelopment Commission; provided that not less than four (4) members shall constitute a quorum. No vacancy shall impair the right of the remaining members to exercise the powers of the Redevelopment Commission.

SECTION 4: Notice of Hearings. Notice of any hearing held by the Redevelopment Commission shall state the date, time, and place of the hearing and give the purpose of the hearing. If the designation of a business district redevelopment area is the subject matter of the hearing, the notice shall give a general description of the business district redevelopment area. Notice of any hearing shall be published at least once in at least one newspaper of general circulation in the

City.

SECTION 5: Hearings. At any hearing of the Redevelopment Commission, all interested parties may appear and testify. The Redevelopment Commission shall hear and determine all protests and objections or other testimony or evidence bearing upon the subject of the hearing. All interested persons desiring to be heard will be afforded a reasonable opportunity to be heard. The hearing may be adjourned or continued to another date at the discretion of the Redevelopment Commission without further notice other than a motion to be entered upon the minutes fixing the time and place of subsequent hearings.

SECTION 6: Powers of Redevelopment Commission.

(a) The Redevelopment Commission shall advise the City Council of the City with regard to:

(1) The establishment of the boundaries of business district redevelopment areas;

(2) Any modification to the boundaries of any business district redevelopment area;

(3) The formulation and implementation of redevelopment plans, projects and programs;

(4) Appropriate actions to reconstitute community pride in the business district redevelopment areas.

(b) The Redevelopment Commission shall perform the duties and functions set forth in the Subdivision ordinance, Zoning ordinance, and any other ordinances of the city regulating land use and/or development and shall serve in lieu of the Planning Commission, Zoning Board of Appeals -or any other City commission or boards with regard to property within a designated business district redevelopment area.

(c) The Redevelopment Commission shall perform all-duties and functions set forth in the Zoning Ordinance of the City of Peru, in lieu of the Zoning Board of Appeals, with regard to a property within a designated business district redevelopment area.

(d) The Redevelopment Commission shall perform all duties and

functions set forth in the Subdivision Ordinance and Zoning Ordinance of the City of Peru, in lieu of the City Planning Commission, with regard to all property within a designated business district redevelopment area.

(e) Upon completion of any hearing held pursuant to this Ordinance, the Redevelopment. Commission shall forward its findings, decisions and recommendations to the City Council, who shall make the final determination in each case.

In performing its functions set forth in the aforesaid-subsections (a) through (d), the actions of the Redevelopment Commission shall be solely advisory to the City Council.

(f) The Redevelopment Commission shall decide any application for a building permit for any property within a designated business district redevelopment area, for' any new construction, for reconstruction, and for interior or, exterior remodeling, or maintenance, the-estimated cost of which would exceed Five Hundred Dollars ($500.00). The Redevelopment Commission shall approve such building permits for construction, reconstruction, or interior or external remodeling within the business district redevelopment area which conforms to the business district redevelopment plans and projects adopted by the City Council. Construction, reconstruction, internal or external remodeling may be permitted to vary from the redevelopment plans and projects upon a determination by the Redevelopment Commission that said variation will not affect the redevelopment plans or projects, and it' is further determined that said construction, reconstruction, interior or external remodeling will assist in the revitalization of the business district redevelopment area.

In the event that a building permit for construction, reconstruction, internal or external remodeling within a business district redevelopment area is denied by the Redevelopment Commission, the property owner may, within thirty (30) days of receipt of notice of such denial, appeal the decision .of the Redevelopment Commission to the City

Council by filing written notice of said appeal with the City Clerk.

(h) The Redevelopment Commission shall keep a public record of its resolutions, findings, and determinations.

(i) The City shall present to the Redevelopment Commission timetables by which it anticipates that functions to be performed by the Redevelopment commission will be complete. The failure of the Redevelopment Commission to take action when requested by the City shall not limit the power of the City to proceed hereunder.

(j) All signs in a business district redevelopment area shall be presented to the Redevelopment commission for approval. The Redevelopment Commission shall conduct a public hearing upon any application for a building permit for the construction and placing of any signs in a business district redevelopment area and make its recommendation to the City Council.

SECTION 7. Powers of Corporate Authorities.

In conjunction with the powers it now has, the City by action of the City Council may:

(a) Adopt the boundaries of a business district redevelopment area.

(b) Approve all development and redevelopment proposals for any designated business redevelopment area, including requests for zoning variances and requests for special exceptions from zoning regulations.

(c) Acquire by purchase, gift., lease, condemnation, or otherwise, rights in real property in any business district redevelopment area. If any such real property is subject to easements the City, in its discretion, may acquire the fee simple title to such real property subject to such easements if the City Council determines that such easements, will not interfere with carrying out the business district redevelopment plan. If any such real property is already devoted to a public use it may nevertheless be acquired, provided that no property belonging

to the federal, state, or local government unit may be acquired without the consent of such governmental unit and that no property devoted to the public use belonging to a corporation subject to the jurisdiction of the Illinois Commerce Commission may be acquired without the approval of the Illinois commerce commission.

(d) Clear or have cleared any area acquired, by demolition or removal of existing buildings and structures, and prepare the area for reuse in accordance with a redevelopment plan.

(e) Build new structures and buildings and renovate, rehabilitate, or physically relocate any structure or building which has been acquired, or if any structure or building or the land supporting it has not been acquired, permit the owner to renovate or rebuild the structure or building in accordance with the redevelopment plan.

(f) Make loans and grants, or guarantee loans made by other institutions, public or private, to persons in a redevelopment area for the purposes of rehabilitating structures or constructing new structures in such area.

(g) Install, repair, construct, reconstruct, or relocate streets, utilities and site improvements essential to the preparation of the redevelopment area for use in accordance with a redevelopment plan, and with or without charge, grant easements for such utilities.

(h) Sell, mortgage, or lease, or otherwise transfer or convey real property acquired for use in accordance with the redevelopment plan for such price, and at such time, as the City Council may determine. However, no sale, , mortgage or lease shall ever be made in such manner as to impair the rights or interests of the holder or holders of. obligations issued to finance the project costs of such project. Any redevelopment area may be sold either as an entirety or in such parcels as the City may select. It is not necessary that title be acquired to all real property within a redevelopment area before the sale of a part thereof may be made as herein

provided.

(i) Convey any part of the redevelopment area to any public body having jurisdiction over schools, parks, or playgrounds or other public purposes in the area. The property so conveyed shall be used for parks, playgrounds, schools, and other public purposes, and the City may charge for such conveyances whatever price it and the officials of the public bodies receiving the land may agree upon.

(j) Retain real property for uses prescribed by the redevelopment plan.

(k) Enter into such cooperation agreements, with or without consideration, as the City Council shall deem appropriate to carry out the purposes of the redevelopment plan.

(l) Engage in such relocation activities as are prescribed by the redevelopment plan.

(m) Borrow money, apply for and accept advances, loans, grants, contributions, gifts, services, or other financial assistance from the United States of America,, or any agency or instrumentality thereof, the state, county, municipality or other public body or from any source, public or private, for or in aid of any other purposes of the redevelopment plan or redevelopment project.

(n) Issue obligations to defray in whole or in part the redevelopment project costs of, any one or more redevelopment projects.

(o) Raise revenue by the adoption of such taxes and establishment of such special tax districts as are permitted under the Constitution and the laws of the State of Illinois.

(p) Use for any of the purposes of this ordinance any of the funds arising , f rom the use or sale of any property acquired under the provisions of this ordinance and to the extent not otherwise pledged for the payment of obligations.

(q) Exercise any powers to implement a redevelopment plan, including,, but not limited to, those powers enumerated in Ill. Rev. Stat., 1989, Ch. 24, Section 11-74.3-3.

(r) Exercise any one or more of the foregoing powers in any combination to carry out redevelopment plans and/or redevelopment projects, and to exercise such other powers as shall be necessary to carry out the purposes of any redevelopment plan and/or project.

Property acquired by the City, pursuant to the provisions of this ordinance, shall be exempt from the imposition and collection of taxes thereon while owned by the City, but, unless otherwise provided by the City Council, the use of such property is subject to taxation to be paid by lessees or occupants as provided by law.

SECTION 8: Restrictions and Redevelopers. To assure that the real property sold by the City is used in accordance with a redevelopment plan, the City shall inquire into and satisfy itself concerning. the financial ability of the purchaser to complete the redevelopment in accordance with the redevelopment plan and shall require the purchaser to execute in writing such undertakings as it may deem necessary to obligate the purchaser to:

(1) Use the property for the purpose designated in the approved redevelopment plan;
(2) Commence and complete the building of the improvements within the periods of time which the corporate authorities fix as reasonable;
(3) Not resell" transfer, or otherwise convey the property or any interest therein prior to certification of satisfactory completion of improvements without approval by the city council;
(4) Not discriminate upon the basis of race, color, religion, sex, or national origin in the sale, lease, or rental, or in the use or occupancy of the property or any improvements erected or to be erected thereon, or any part thereof;
(5) Comply with such other conditions as are necessary to carry out the purposes of the final redevelopment plan.

SECTION 9: Severability Clause. The provisions of this ordinance are severable and if any of its provisions or any sentence, clause or paragraph shall be held unconstitutional or unlawful by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

SECTION 10: Effective Date. This Ordinance shall be effective

immediately from and after its passage and approval.

PRESENTED, PASSED, AND ADOPTED at a regular meeting of the City Council of the City of Peru, Illinois, by an aye and nay roll call vote, with 8 voting aye, 0 voting nay, 0 absent, and Mayor Baker not voting which meeting was held on the 29th day of July, A.D. 1991.

APPROVED: July 29, 1991

/S/Donald L. Baker, Mayor

(CORPORATE SEAL)

ATTEST

/S/ Patricia K. Gately, City Clerk

G.

ORDINANCE NO. 2915

AN ORDINANCE ESTABLISHING THE BOUNDARIES OF, AND ADOPTING A BUSINESS DISTRICT DEVELOPMENT AND REDEVELOPMENT PLAN FOR, THE DOWNTOWN BUSINESS DISTRICT OF THE CITY OF PERU, ILLINOIS

WHEREAS, the economic vitality of the Downtown Business District within the City of Peru, Illinois, (hereinafter "City") is becoming threatened by the progressive and advanced deterioration of many structures which results in declining business activity in the Downtown Business District; and

WHEREAS, the Downtown Business District of the City will become blighted if the decline in the use and condition of structures in the Downtown Business District is not checked; and

WHEREAS, it is essential to the economic and Social welfare of the City that the Downtown Business District be maintained and revitalized by assuring opportunities for development and redevelopment by attracting sound and stable commercial growth; and

WHEREAS, the economic success of the City has been largely the result of substantial sales tax revenue the City receives and a revitalized Downtown Business District is essential to maintain and increase those sales tax revenues to the City; and

WHEREAS, pursuant to Ordinance No. 2904 duly passed and adopted July 29, 1991 entitled: "AN ORDINANCE CREATING A BUSINESS DISTRICT DEVELOPMENT AND REDEVELOPMENT COMMISSION FOR THE CITY OF PERU, ILLINOIS" (hereinafter "DRC Ordinance"), the City heretofore created a Business District Development and Redevelopment Commission for the city of Peru, Illinois, (hereinafter "Commission"); and

WHEREAS, the City Council of the City has heretofore held several public hearings concerning the establishment of a Downtown Business District Development and Redevelopment Plan; and

WHEREAS, the Commission held hearings on August 22, 1991, and August 29, 1991, concerning the boundaries of a Downtown

Business District for the purpose of a Business District Development and Redevelopment Plan for Downtown, Peru, Illinois, (hereinafter "Plan"); and

WHEREAS, the Commission has unanimously recommended that the Downtown Business District be bounded east to west from West Street to Pike Street and from north to south from Fifth Street to Third Street; and

WHEREAS, the Commission has further recommended that the Business District Development and Redevelopment Plan for Downtown, Peru, Illinois, dated August, 1991, prepared by Peckham, Guyon, Albers and Viets, Inc., (hereinafter "PGAV") with the changes recommended by the commission, be approved and adopted; and

WHEREAS, the development and/or redevelopment of business s districts are matters pertaining to the government and affairs of the City, are proper public purposes, and are in the interests of the public health, safety, and welfare of the City; and

WHEREAS, City Council finds it is in the best interests of the City to create a Downtown Business District and adopt the Plan for Downtown, Peru, Illinois, all as recommended by the Commission.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF PERU, LASALLE COUNTY, ILLINOIS, A HOME RULE MUNICIPALITY, AS FOLLOWS:

SECTION 1: Recitals. The City Council finds as facts the recitals hereinbefore set forth.

SECTION 2: Boundaries of District. There is hereby created and established a Downtown Business District Development and Redevelopment area which shall consist of all that real estate within the area bounded by West Street and Pike Street east to west and by Fifth Street to Third Street north to south (hereinafter "Downtown Business District").4

SECTION 3: Adoption Plan. The Business District Development and Redevelopment Plan for Downtown, Peru, Illinois, as prepared by PGAV dated August, 1991, a copy of which is hereto attached, shall be, and is hereby, adopted as a Plan for the Downtown Business District.

SECTION 4: The provisions of this ordinance are severable and if any of its provisions or any sentence, clause, or paragraph shall be held unconstitutional or unlawful by any court of competent jurisdiction, the decision of such court shall not effect or impair any of the remaining provisions.

SECTION 5: This Ordinance shall be effective immediately from and after its passage and approval and shall be published in pamphlet form.

PRESENTED, PASSED, AND ADOPTED at a regular meeting of the City Council of the City of Peru, Illinois, by an aye and nay roll call vote, with 8 voting aye, 0 voting nay, 0 absent, 0 passing, and Mayor Baker not voting which meeting was held on the 9th day of September, 1991, A.D.

APPROVED: September 9, 1991

/S/ Donald L. Baker, Mayor

(CORPORATE SEAL)

ATTEST:

/S/ Patricia K. Gately, City Clerk

H.

ORDINANCE NO. 3238

AN ORDINANCE AUTHORIZING ACQUISITION OF CERTAIN REAL ESTATE FOR PURPOSES OF REDEVELOPMENT OF THE DOWNTOWN BUSINESS DISTRICT OF THE CITY OF PERU AND EXPANSION OF A MUNICIPAL PARKING LOT

WHEREAS, the economic vitality of the Downtown Business District within the City of Peru, an Illinois home rule municipal corporation, (hereinafter "City") is becoming threatened by the progressive and advanced deterioration of many structures which results in decline of business activity in the Downtown Business District; and

WHEREAS, the Downtown Business District of the City may become blighted if the decline in use and condition of structures in the Downtown Business District is not checked; and

WHEREAS, it is essential to the economic and social welfare of the City that the Downtown Business District be maintained and revitalized by providing opportunities for development and redevelopment by attracting sound and stable commercial growth; and

WHEREAS, the economic success of the City has been largely the result of a substantial real estate tax base and the substantial sales tax revenues the City receives, and revitalizing the Downtown Business District is essential to maintain an increase in the real estate tax base and sales tax revenues to the City; and

WHEREAS, it is necessary to provide adequate parking for development and redevelopment purposes and adequate access for existing and potential development in the Downtown Business District; and

WHEREAS, the City Council of the City has adopted a plan for the development and redevelopment of the Downtown Business District (hereinafter "Plan") and, as part of the Plan, the City Council of the City has determined that it is necessary, convenient, and desirable to acquire the real estate for parking lot expansions; and

WHEREAS, the acquisition of the real estate hereinafter described

in attached Exhibits A, B, and C (hereinafter "Properties") for downtown parking and/or related purposes is a matter pertaining to the government and affairs of the City, is a proper public purpose, and is in the interest of the public health, safety and welfare of the City; and

WHEREAS, it is advisable to acquire the Properties and develop the same for public parking; and

WHEREAS, on October 7, 1991, the Business District Development and Redevelopment Commission of the City (hereinafter "Redevelopment Commission") recommended and approved the acquisition of the Properties by the City for the purpose of expanding the existing municipal parking lot; and

WHEREAS, on May 24, 19951, the Plan Commission of the City (hereinafter "Plan Commission") recommended and approved the acquisition of the Properties by the City to expand the existing municipal parking lot.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF PERU, LASALLE COUNTY, ILLINOIS, A HOME RULE MUNICIPALITY, AS FOLLOWS:

SECTION 1: Recitals. The City Council of the City finds as facts the recitals hereinbefore set forth.

SECTION 2: Property Acquisition. In accordance with the Plan and the recommendations of the Development and Redevelopment Commission and the Plan Commission, it is determined that it is necessary for the City to acquire the Properties, to wit:

A.

The South Forty (40) feet of the North Eighty (80) feet of Lots Four (4) and Five (5) in Block Twenty-eight (28) in Ninewa Addition to the Town, now City of Peru, except coal and minerals and the right to mine and remove the same; all situated in County of LaSalle and State of Illinois. Tax I.D Number 17-17-429-002.

B.

That part of the South 45 feet of Lot 4, Block 28, in Ninewa Addition to the Town, now City of Peru, in the City of Peru, described as follows: Beginning at a point on the South Line of said Lot 4, 19 feet West of the Southeast corner of said Lot; thence West along said South Line for a distance of 20 feet;

thence Northeast for a distance of 14.14 feet to a point 29 feet West and 10 feet North of said Southeast corner; thence North 35 feet; thence East 10 feet; thence South 45 feet to the Point of Beginning, subject to the right-of-way for alley purposes across the South 5 feet thereof; all situated in County of LaSalle and State of Illinois.

C.

The East 19 feet of the South 45 feet of Lot 4 in Block 28 in Ninewa Addition to the Town, now City, of Peru, subject to the alley over the South 5 feet thereof; all situated in County of LaSalle and State of Illinois.

and that the Properties be used, improved, and developed for a municipal parking lot.

SECTION 3: Necessity. It is determined that it is essential to the economic and social welfare of the City, and that it is necessary, required, and needed that the Properties be acquired to expand the contiguous existing municipal parking lot.

SECTION 4: Authorization. The Mayor, for and on behalf of the City, is hereby authorized, empowered and directed to negotiate with the owner or owners of the Properties for the purchase thereof by the City.

SECTION 5: Further Authorization. In the event that the Mayor is unable to agree with the respective owners of the Properties as to the compensation to be paid therefore, then title to and possession of the Properties shall be acquired by the City through condemnation, and Douglas J. Schweickert, Corporation Counsel, Scott J. Ganassin, Assistant Corporation Counsel, and William P. Hintz, Assistant Corporation Counsel, for the City are hereby authorized, empowered, and directed to institute proceedings in any Court of competent jurisdiction to acquire title to and possession of the Properties for the City in accordance with the eminent domain laws of the State of Illinois.

SECTION 6: Effective Date. This Ordinance shall be effective immediately from and after its passage and approval.

PRESENTED, PASSED, AND ADOPTED at a regular meeting of the City Council of the City of Peru, Illinois, by an aye and nay

roll call vote, with 6 voting aye, voting nay, absent, and Mayor Baker not voting, which meeting was held on the 30th day of May, A.D., 1995.

APPROVED: May 30, 1995

/S/ Donald L. Baker, Mayor

ATTEST:

/S/ Judith A. Heuser, City Clerk

I.

Complaint for condemnation filed by the City of Peru on June 27, 1995.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

LA SALLE COUNTY, OTTAWA, ILLINOIS

CITY OF PERU, an Illinois home rule municipal corporation,	)	
Plaintiff,	)	
vs.	)	No. 95-ED-3
DONALD E. KOTECKI; TRACY L. KOTECKI; EUREKA SAVINGS BANK; UNKNOWN HEIRS AT LAW OR DEVISEES OF WILLIAM A. EAKIN, AND UNKNOWN OWNERS AND NONRECORD CLAIMANTS,	)	
Defendants.	)	

COMPLAINT FOR CONDEMNATION

COUNT I

NOW COMES the Plaintiff, City of Peru, an Illinois home rule municipal corporation, by Douglas J. Schweickert, Scott J. Ganassin, and William P. Hintz, its Corporation Counsel, and for its Complaint for Condemnation states as follows:

1. Plaintiff, City of Peru, is a home rule municipal corporation organized under the laws of the State of Illinois, and is situated in the County of LaSalle and State of Illinois.

2. By virtue of the Business District Development and Redevelopment Act, 65 ILCS 5/11-74.3-3 (hereinafter "Act") , the Plaintiff has established a Business District Development and Redevelopment Project by Ordinance No. 2904 of the City of Peru

entitled: "An Ordinance Creating a Business District Development and Redevelopment Commission for the City of Peru, Illinois" (hereinafter "Ordinance"), a copy of which is hereto attached.

3. By virtue of the Act and the Ordinance, the Plaintiff is authorized to exercise the use of eminent domain powers for the acquisition of real property for the purpose of a development or redevelopment project.

4. Plaintiff has established the boundaries of the Business District Development and Redevelopment Project by Ordinance No. 2915 of the City of Peru entitled: "An Ordinance Establishing Boundaries of, and Adopting a Business District Development and Redevelopment Plan for, the Downtown Business District of the City of Peru, Illinois" (hereinafter "Boundary Ordinance"), a copy of which is hereto attached.

5. The lands, rights, or other property or interest hereinafter described are private, and are located within the Downtown Business District as defined by the Boundary Ordinance and the persons hereinafter named as Defendants, so far as appears of record, and so far as Plaintiff has been able to ascertain with due diligence, are the owner or owners of, or person or persons interested in said property or claim some interest therein.

6. Plaintiff has enacted Ordinance No. 3238 entitled: "An Ordinance Authorizing Acquisition of Certain Real Estate for Purposes of Redevelopment of the Downtown Business District of the City of Peru and Expansion of a Municipal Parking Lot" (hereinafter "Acquisition Ordinance"), a copy of which is hereto attached, and which found and determined it necessary to expand the municipal parking lot for public use and convenience and further found and determined that it is necessary to acquire the property herein described for this purpose.

7. The exercise of these powers provided by the Act and the Ordinance is dedicated to the promotion of the public interest and is a public use essential to the public interest.

8. It has been determined that it is necessary for the Plaintiff to acquire fee simple title to and the possession of the real property

hereinafter described for the purpose of Development and Redevelopment of the Downtown Business District of Plaintiff.

9. The compensation to be paid by the Plaintiff for the property described herein and sought to be appropriated for the abovementioned purpose cannot be agreed upon between the Plaintiff and the parties interested herein, although Plaintiff has attempted to effect such an agreement; and Plaintiff, therefore, is authorized to proceed to acquire said lands, rights, or other property through the exercise of the right of eminent domain as granted by the aforementioned Act and/or Ordinance.

10. Plaintiff now seeks to acquire for the use and purposes aforesaid, fee simple title in and to the real property legally described as follows:

> The South Forty (40) feet of the North Eighty (80) feet of Lots Four (4) and Five (5) in Block Twenty-eight (28) in Ninewa Addition to the Town, now City of Peru, except coal and minerals and the right to mine and remove the same; all situated in County of LaSalle and State of Illinois. Tax I.D Number 17-17-429-002. Commonly known as 821 Peoria Street, Peru, IL.

11. The names of all persons interested in the property sought to be acquired, as owners or otherwise appearing of record or so far as known to the Plaintiff, all of whom are hereby made Defendants to this Complaint, are as follows:

(a) Owners of record: Donald E. Kotecki and Tracy L. Kotecki;

(b) Eureka Savings Bank;

(c) Unknown heirs at law or devisees of William A. Eakin; and

(d) Unknown owners and Nonrecord Claimants.

12. In addition to the persons designated by name as Defendants, there are other persons who are interested in this action and who have or claim some right, title, interest or lien in, to, or upon the real estate described above, or some part thereof, and the name of each of said other persons is unknown and all such persons are therefore Defendants to this action by the name and description of Unknown Owners.

13. In addition to persons designated by name, there are or may be

other persons occupying or in possession of a portion of the building or structures on said real property described, and the name of each of said persons is unknown and all such persons are, therefore, made Defendants to this action by the name and description of Unknown Owners.

14. In addition to the persons designated by name, there are or may be other persons who are interested in this action and who have or claim some right, title, interest or lien in, to or upon the real estate described above, or some part thereof by virtue of being the heirs or devisees of William A. Eakin, and the names of each of said other persons is unknown and all such persons are therefore Defendants to this action by the name and description of Unknown Owners.

15. In addition to the persons designated by name herein, there are other persons who have or claim to have an interest in or upon the real estate which is not disclosed of record by recorded notice or proceeding which would give constructive notice. The name or names of these other persons are unknown to Plaintiff and to this Affiant and all such other persons remain parties to this action by the name and description of Nonrecord Claimants.

WHEREFORE, the Plaintiff, City of Peru, an Illinois home rule municipal corporation, prays that Summons be issued against the above Defendants according to the law, commanding them to appear before this Court on the return day of said Summons, and that due notice according to the law be given to the owners of, parties interested in, and to the Unknown Owners and Nonrecord Claimants of said real property described above. Plaintiff further prays that just compensation be made to the owners and persons interested in said lands, rights and other property, and to each of them, as entitled under the laws of the State, to be ascertained and determined according to the Statute with relation to the exercise of the right of eminent domain; and that such proceeding may be had and taken and judgments or orders entered, and that the Plaintiff may have such other further relief as may be required and permitted by statute.

COUNT II

NOW COMES the Plaintiff, City of Peru, an Illinois home rule municipal corporation, by Douglas J. Schweickert, Scott J. Ganassin, and William P. Hintz, its Corporation Counsel and for its Complaint for Condemnation states as follows:

1. Plaintiff, City of Peru, is a home rule municipal corporation organized under the laws of the State of Illinois, and situated in the County of LaSalle and State of Illinois.

2. By virtue of the Off-Street Parking Act (hereinafter "Parking Act") , 65 ILCS 5/11-70-3, the Plaintiff has established a Parking Lot Expansion Project by Ordinance No. 3238 of the City of Peru entitled: An Ordinance Authorizing Acquisition of Certain Real Estate for Purposes of Redevelopment of the Downtown Business District of the City of Peru and Expansion of a Municipal Parking Lot (hereinafter "Parking Lot Ordinance") , a copy of which is hereto attached.

3. By virtue of the Parking Act, the Plaintiff is authorized to exercise the use of eminent domain powers for the acquisition of real property for the purpose of a parking lot expansion project.

4. The Parking Act and Parking Lot Ordinance authorize the Plaintiff to obtain the property described herein.

5. The Parking Lot Ordinance promotes the economic and social welfare of the City of Peru by maintaining and revitalizing the central business district of the Plaintiff by providing additional parking for the individual businesses located therein which will attract consumers and in turn will cause the business district to grow commercially and provide revenue from the use of the municipal parking lot.

6. On October 7, 1991, the Business District Development and Redevelopment Commission of the City recommended and approved the acquisition of certain properties by the City for the purpose of expanding the existing municipal parking lot.

7. On May 24, 1995, the Plan Commission of the City of Peru approved the expansion of a municipal parking lot on the real property described herein and recommended and approved the acquisition of the property by the City to expand the existing municipal parking lot.

8. The exercise of these powers provided by the Parking Act is dedicated to the promotion of the public interest and is a public use essential to the public interest.

9. The lands, rights, or other property or interest hereinafter described are private, and the persons hereinafter named as Defendants herein, so far as appears of record, and so far as Plaintiff has been able to ascertain with due diligence, are the owner or owners of, or person or persons interested in said property or claim some interest in the same.

10. It has been determined by the Parking Lot Ordinance that it is necessary for the Plaintiff to acquire fee simple title to and possession of the real property hereinafter described for the purpose of expansion of the municipal parking lot of Plaintiff.

11. The compensation to be paid by the Plaintiff for the property described herein and sought to be appropriated for the above mentioned purpose cannot be agreed upon between the Plaintiff and the parties interested herein, although Plaintiff has attempted to effect such an agreement; and Plaintiff, therefore, is authorized to proceed to acquire said lands, rights and/or other property through the exercise of the right of eminent domain as granted by the aforementioned Parking Act and/or Parking Lot ordinance.

12. Plaintiff now seeks to acquire for the use and purpose aforesaid fee simple title in and to the real property legally described as follows:

> The South Forty (40) feet of the North Eighty (80) feet of Lots Four (4) and Five (5) in Block Twenty-eight (21.3) in Ninewa Addition to the Town, now City of Peru, except coal and minerals and the right to mine and remove the same; all situated in County of LaSalle and State of Illinois. Tax I.D Number 17-17-429-002. Commonly known as 821 Peoria Street, Peru, IL.

13. The names of all persons interested in the property sought to acquired as owners or otherwise appearing of record, so far as known to the Plaintiff, all of whom are hereby made Defendants to this Complaint, are as follows:

(a) Owners of record: Donald E. Kotecki and Tracy L. Kotecki;

(b) Eureka Savings Bank; and

(c) Unknown heirs at law or devisees of William A. Eakin; and

(d) Unknown Owners and Nonrecord Claimants.

14. In addition to the persons designated by name as Defendants, there are other persons who are interested in this action and who have or claim some right, title, interest or lien in, to or upon the real estate described above, or some part thereof, and the name of each of said other persons is unknown and all such persons are therefore Defendants to this action by the name and description of Unknown Owners.

15. In addition to persons designated by name, there are or may be other persons occupying or in possession of a portion of the building or structures on said real property described, and the name of each of said persons is unknown and all such persons are, therefore, made Defendants to this action by the name and description of Unknown Owners.

16. In addition to the persons designated by name, there are or may be other persons who are interested in this action and who have or claim some right, title, interest or lien in, to, or upon the real estate described above, or some part thereof, by virtue of being the heirs or devisees of William A. Eakin, and the names of each of said other persons is unknown. and all such persons are therefore Defendants to this action by the name and description of Unknown Owners.

17. In addition to the persons designated by name herein, there are other persons who have or claim to have an interest in or upon the real estate which is not disclosed of record by recording notice or proceeding, which would give constructive notice. The name or names of these other persons are unknown to Plaintiff and to this Affiant and all such other persons remain parties to this action by the name and description of Nonrecord Claimants.

WHEREFORE, the Plaintiff, City of Peru, an Illinois home rule municipal corporation, prays that summons be issued against the above Defendants according to the law, commanding them to appear before this Court on the return day of said Summons, and that due

notice according to the law be given to the owners of, parties interested in, and to the Unknown Owners and Nonrecord Claimants of said real property described above. Plaintiff further prays that just compensation be made to the owners and persons interested in said lands, rights and other property, and to each of them, as entitled under the laws of the State, to he ascertained and determined according to the statute with relation to the exercise of the right of eminent domain; that such Proceeding may be had and taken and judgments or orders entered, and that the Plaintiff may have such other further relief as may be required and permitted by statute.

CITY OF PERU, an Illinois home rule municipal corporation, Plaintiff

/S/ Donald L. Baker, Mayor

ATTORNEYS SCHWEICKERT & GANASSIN

BY: /S/ William P. Hintz

VERIFICATION AFFIDAVIT

STATE OF ILLINOIS)
) SS
COUNTY OF LASALLE)

Donald L. Baker, being first and duly sworn on oath, deposes and states that he is the Mayor for the Plaintiff and as Mayor he signed the foregoing Petition for Condemnation; that he understands the contents thereof and the same are true and correct to the best of his information and belief.

/S/ Donald L. Baker

Subscribed and sworn to before
me this 26th day of June, 1995.

/S/ Douglas J. Schweickert
Notary Public

J.

The written order entered on February 20, 1997, by the Honorable James A. Lanuti, of Circuit Court for the Thirteenth Judicial Circuit, LaSalle County, Illinois, set forth the following:

THE UNITED STATES OF AMERICA
STATE OF ILLINOIS COUNTY OF LASALLE
IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

City of Peru

-vs-

Donald E. Kotecki Case No.: 95-ED-3

ORDER

This matter coming on to be heard on Defendants' Traverse and Motion to Dismiss, after argument of Counsel and presentation of testimony and evidence.

Count I

It Is Hereby Ordered that the Traverse and Motion to Dismiss are hereby denied for the reasons set forth in the record.

Trial on the valuation is set for July 14, 1997 at 10:00 A.M.

Status is set for April 29, 1997 at 9:00 A.M. Plaintiff shall supply Defendant with updated appraisal within 30 days. Defendant shall supply his appraisal 30 days thereafter. Depositions shall be completed within 30 days thereafter.

Count II

The Traverse and Motion to Dismiss Count II of the complaint is granted for the reasons stated on the record.

Dated: 2/20/97 /S/ James A. Lanuti
Judge

K.

Transcript of February 20, 1997, hearing in the Circuit Court for the Thirteenth Judicial Circuit, LaSalle County, Illinois, containing the parties' closing arguments at the close of the hearing on the defendants' traverse and the ruling by the Honorable James A. Lanuti on said motions, indicated that the hearing proceeded as follows:

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

LA SALLE COUNTY, ILLINOIS

CITY OF PERU, Plaintiff,	)	
v.	)	No. 95-ED-3
DONALD KOTECKI, et al., Defendants.	)	

REPORT OF PROCEEDINGS from the Hearing in the above-entitled cause held on February 20, 1997, before the Honorable JAMES A. LANUTI, Circuit Judge of said Court, in his courtroom in the LaSalle County Courthouse.

REPORTED BY:
BETH M. BUTE
OFFICIAL COURT REPORTER
L.N. 083-002199
LaSalle Co. Courthouse
Ottawa, IL 61350

APPEARANCES:

MR. WILLIAM HINTZ,
ATTORNEY AT LAW,
Peru, Illinois,

on behalf of the Plaintiff.

MR. LOUIS E. OLIVERO,
ATTORNEY AT LAW,
Peru, Illinois,

on behalf of the Defendants.

THE COURT: Okay, this is 95-ED-3, City of Peru v. Donald Kotecki.

The matter is here today for final arguments and ruling on the traverse and motion to dismiss which was filed by Mr. Kotecki.

I guess, Mr. Hintz, if you want to make any final summary.

MR. HINTZ: Well, I think Mr. Olivero has the burden of proof here, Judge, and I have no problem reserving mine until he's done with his final argument. If you are --

THE COURT: Yeah, that may be logical. Let's approach it that way. Mr. Olivero can make a motion in support of his motion and traverse and if you want to make a final argument you can do that.

MR. OLIVERO: Thank you, Your Honor. To bring the Court up to where I feel the evidence and the status of the case is at this point is that the plaintiff filed a two count complaint, the first count of their complaint they allege that they had the right to condemn Mr. Kotecki's property under the fact that they had adopted an ordinance in the City of Peru creating a -- the Redevelopment Commission, and under that authority and citing that ordinance as well as the act of the state legislature, which is division 74.3 of 65 ILCS, the argument that I made in my summary judgment motion and I think in my motion here that the state statute is unconstitutional and the ordinances, as adopted, are void because they don't comply with the Illinois municipal code as to the duties of a municipality in enacting an ordinance.

And, of course, as to Count II the Court has already ruled, so I'll concentrate only on the unconstitutionality of the statute and the ordinances and the fact that in the --

THE COURT: I don't want to cut you off but, I mean, I thought that when I had ruled on your motion for a directed verdict at the end of their case when they had finished putting their evidence on, I mean, that I had ruled, and if it wasn't clear, I'll make that ruling now, and I believe I said this fairly clearly on the record, that as far as the constitutional argument that you had raised that I was ruling against them. Now, you have already made all those arguments. They are in the record. I don't expect you to waive any of those arguments.

MR. OLIVERO: Okay.

THE COURT: And they were in your original motion for summary judgment and you argued them at length at the end of the city's case. I think where we are was at this point is pretty aptly set up in your motion for summary judgment at the close of all the evidence. I think you concentrated on the issue and at this point the

issue is are they abusing their power. You raised a few issues and I read that, and I would like you to concentrate in that area, not the constitutionality, understanding you're not waiving anything.

MR. OLIVERO: That's all I wanted. I didn't want the Court -- and I would just like to point out one other thing, Your Honor, and the first argument is under the statutes of the State of Illinois municipalities must proceed in accordance with the powers granted by the legislature, and as the Court found in the Count II, they failed to publish in the ordinance in question, and in this case here under 65 ILCS 5/1-2-2, publications of ordinances, they are under a duty to publish any duty that involves appropriate -- any type of appropriation. And, of course, in this case they stated that they had the authority to obtain funds for the payment of this so-called project by issuance of revenue bonds, and there was no proof of any publication of this ordinance.

The second objection I have to the ordinance is just to call to the Court's attention and for purposes only because I do intend to concentrate on the necessity, is that in the ordinance the title of the ordinance is an ordinance creating a Business District Development and Redevelopment Commission for the City of Peru and the violation of the Constitution that the title should only contain one subject is very clear because in section 7 of this ordinance of 2904 they set forth powers of corporate authorities and, of course, that's not what the ordinance was, as I -- and during the course of the trial I pointed out to the Court if you looked at ordinance 2904, the only thing you would get from the title of it is you would find out about the Redevelopment and Development Commission. And they relied upon the section 7 of their -- of that ordinance, which says corporate powers or authorities even in the argument here that they had a right to condemn and, of course, that's a violation of the Constitution. And the fact that they have included more than one subject in the ordinance but only in the title they have reference only to the establishment of the Commission. With reference to ordinance number 2915 where they adopted the boundaries of this Redevelopment District and section 3 of that ordinance, they say, Adoption of Plan, and they quote the exact ordinance, says, The Business District and Development and Redevelopment for downtown, Peru, Illinois, as prepared by PGAV dated August, 1991, a copy of which is hereto attached, shall be, and is hereby, adopted as a plan for the Downtown Business District. And 65 ILCS 5/1-3-1 is the only authority for incorporation by reference in an ordinance and

they didn't follow the precepts of the statute governing the powers and duties of municipalities and violated that also. With that, for the -- just housekeeping, I will now concentrate on the -- my motion to dismiss or direct a verdict as to the abuse of power by the city in that they have failed to prove that there was any necessity whatsoever of taking Mr. Kotecki's property. I believe -- I filed my motion and I cited to the Court, I had the court reporter type up the testimony of Mr. Donald Kowalczyk who was the Superintendent of Public Works for the City of Peru and Alderman David Potthoff, who is an alderman with the City of Peru. I believe in this are the exhibits out, Your Honor?

THE COURT: They are here.

MR. OLIVERO: The Court is familiar with the fact that the minutes of the Planning Commission meeting of May of 1995 are of record and starting just with that, we had the city put on their case through their engineer, Mr. Etzenbach, and Mr. Etzenbach testified under oath that the Exhibit Number 9 --

THE COURT: Oh, those maps may not be here.

MR. HINTZ: Yeah, they are, Judge, they are right out here. Right down on the bottom. Look.

MR. OLIVERO: Oh, okay. I'm sorry, I didn't see them. And these are of record, the Exhibit Number 8 is the original drawing of the public parking area in question and the private alley that's shown as it exists when it was built back in the sixties and as it exists today. And the Court I'm sure can look at this to see that it was all just public parking places. And as Mr. -- or Lieutenant Znaniecki said in the six years since the adoption of the Commission that was in existence he went through the entire records and found there's never been any problems as far as any safety of any pedestrian or human being in the parking lot or crossing the alley. There were incidents, but there were a total of fifteen fender benders or incidents where somebody backed out of a stall and hit somebody coming down the lane. So there was no -clearly -- and Mr. Znaniecki stated they had never done any studies with safety and the Superintendent of Public Works, Donald Kowalczyk, whose job it is to maintain all these municipal parking lots stated that he was never advised, and it's in the transcript, to take any studies. He doesn't know of any. The point being is that when Mr. Etzenbach testified before the Planning Commission his testimony was, and the Court is familiar with it, that, quote, in his testimony, "A reconfiguration of the parking lot has become necessary because of the new developments and change in

truck and traffic flows." He stated that because of the change in truck traffic flow sixteen parking spaces would be lost in the plan, but with the acquisition of the property at 821 Peoria Street, Peru, only seven spaces will be lost.

As I pointed out and the Court will take notice that the exhibits that are on file shows that Mr. Kotecki's property and the drawing that's part of Plaintiff' s Exhibit Number 3 is a piece of property that's forty by 120 feet, so that's 4,800 square feet, and from looking at the drawing you can see that they put approximately twenty parking stalls in that type of a lot as the one indicates in Exhibit Number 8. So instead of gaining twenty parking stalls, by condemning Mr. Kotecki's property they are taking the property and still going to lose seven. In his testimony before the Planning Commission and in open court, he said four. But either way you want to take it they are losing a net of four or a net of seven, depending on which time Mr. Etzenbach figured it out, I don't know.

So the point being that, that was Mr. Etzenbach's theory and he said that he did this because the Council had informally said to draw up a plan to solve this truck traffic flow problem.

And in Exhibit Number 9 the Court can see that they have really made -- and it's of record and it's admitted, these traffic lanes are fourteen feet wide. That's 28 feet of traffic flow. That's wider than one of the lanes on the interstate. We have dual lanes on the interstate with two roads -- I mean, two lanes that are twelve foot wide. One lane going east and west, of course, on the interstate system and, of course, to take a 48 foot semi at the cost of making that is astronomical and nowhere did anybody come into this court and say what this cost was going to be to take this area and convert this public parking lot into fourteen foot here and add to the private alley some to make this alley which is twelve foot, add more than four feet or 28 feet will be taken out and come in and out of 5th Street.

As I pointed out to the Court, the only semis in the entire world that would come to Peru, Illinois, to use this "public", quote, unquote, parking lot and traffic lane that they have designed is a semi that's going to deliver merchandise to either Letterkraft at the loading dock or Debo's Hardware. Now, that is a private purpose for private gain. You're not going to find Campbell's or Phillips 66 or Hunt's or Mumford of Colorado doing this. And there's 48 foot semis coming down here, flying down here and taking a right through here (indicating) because it's a truck traffic flow. Doesn't make sense,

does it? The only trucks that come to this area is a private truck for a private delivery. No way is this public in any way, shape or form. They can argue all they want and the evidence, the record is closed, there is nothing in this record to show that this is for a public purpose. Quite to the contrary. cited to the Court the cases. This is clearly for a private use for private individuals at the expense of the taxpayers and at the expense of Mr. Kotecki because his property which is adjacent hereto, the Zukowsky building and his building is approximately right here (indicating) on this drawing, Your Honor, we have that they are taking his property and the net effect is after you do all the configurations, the existing property for public purposes will be reduced by seven or four spaces, depending on which argument you want to use.

And to verify and to support that further, there was a letter that was written to the City Council, I'm sorry, to the City Attorney's Office, where he says, and introduced by the plaintiff, says in regard to our meeting with Mayor Baker and yourself, meaning Mr. Schweickert who is corporate counsel, on March 11, 194, concerning our property at 821 Peoria, we have evaluated it and at this time we do not wish to sell the property. We clearly understand the city's position and your need for access to dock areas of which we spoke, and this is what the Court heard in this testimony. But we also believe a long term lease of the property to the City of Peru would accomplish the same thing without our loss of ownership and without expense of litigation for both parties. We stand willing to discuss the proposal at your convenience. Now, Mr. Kotecki responded to that on March 25th, 1995.

THE COURT: You just read Kotecki's letter?

MR. OLIVERO: Yes.

THE COURT: The letter you read was from your client?

MR. OLIVERO: Yes.

THE COURT: Right?

MR. OLIVERO: That was introduced by the petitioner.

THE COURT: Right.

MR. OLIVERO: And you can see that the whole tenor of the negotiations and the basis for it is way back in 1994, March of '94, was this access to the dock area as has been testified here by everyone, including the only merchant that they brought in was Mr. Debo and he had to testify and he testified that these semis come down Putnam Street, drive into Sears loading dock and back up to his and he thinks that because they have some problem backing up that

the taxpayers of the City of Peru should make this interstate traffic lane through the public parking lot. And the Court, as pointed out by the people they consulted, said you cannot put a truck traffic flow through the parking lot. This so-called plan they so designed, it's right in there, I think it's Roman numeral III, page 3, if I can find it real fast, but I think I put it in my -- I'll take it back, it's seven, in my argument. But it's in there that specifically that they cannot put a truck -- it's on VI-6, Roman numeral six, dash six, it says by their own plan direct access to the loading areas shall be from streets and alleys and not through parking lots and that's exactly what they have done here in violation of their own plan.

Plus, as I pointed out to the Court, there's only two blocks in the entire City of Peru that they have a private alley for access to the back and it's the 17 and 1800 block and they both have the same type of public parking on the north side of the block between 5th and 4th and that the -- in every other city the merchants receive their deliveries at the street. They either deliver merchandise in and out or they pick up the garbage all on the street. But in the 1700 block the City of Peru wants to spend taxpayer's money for the convenience of private owners of the only two big business houses in the city in that block, Debo's and Letterkraft.

Now, as far as the necessity, as I pointed out to the Court, the alderman, Mr. Dave Potthoff stated in -- and I had his transcribed testimony and it's part of my motion, not the entire part of it, but I just excerpted a portion of it, and Mr. Potthoff stated on his report of proceedings on page twenty, lines one through 18, that -- no, I'm sorry, that was Mr. Kowalczyk. Let me get to Mr. Potthoff. I covered Mr. Etzenbach as to the purpose and Mr. Kowalczyk, let's start with him and I'll get to Mr. Potthoff in a minute.

But starting on page eight of my direct-motion for directed verdict, Your Honor, rather than just repeat what's already in the record once but starting on page 8 and page 9, excerpt from the various pages by Mr. Kowalczyk. He's the man that would know most about the problems with the City of Peru as far as maintenance or construction or use, and he was never, ever called before the Council, the Commission, whether it be the Redevelopment or the Planning Commission, never asked to do any surveys, never asked to give any kind of information that his department was capable of doing in order to give the authorities in the chain of command that -- what information would be needed to make a determination of what is public and what is private use and it's all in the record as to what he

did.

And the next attempt to try to -- as I point out in my argument, the ploy was that now they realized after the depositions were taken that the testimony was that it was for a private use and a private purpose. So Alderman Currie, who happened to have been a truck driver, was deposed and he said that he drives a semi and that in backing up the semi on deliveries he's made to Debo's, and he couldn't be specific, probably six, not more than twelve, that he had difficulty backing it up. Now, of course, I'm sure the Court can take judicial notice of the fact that driving a semi is not like driving a car and whether you are delivering merchandise to the private people behind the fourteen hundred block in their alley or whether you are delivering it at any other location in the entire world, a semi-truck driver has got to back up his semi and that's part of his duties. And so when I asked him, did you ever run into any person -- he was trying to use the umbra of the safety question because, of course, calling it a necessity or calling it safety they think by use of the word that solves the answer. Well, in his facts that he presented to this Court he said he never, ever once struck a pedestrian's car or a building. And the police, that's why I called the police officer to prove to the Court that there was never any safety problems in the entire problem with the semis loading and unloading.

The only -- if the Court will really consider all the testimony, the underlying web that we have of this whole situation is that the two merchants don't want their semi people to be taking five extra minutes to load or unload or having their people load or unload even though it's their own gain or private use and they would expect, as Mr. Debo said, they put spotters out there. Is the innuendo being that the city should have the police department out there putting spotters to have the truck to back up? I mean, that's what public purpose is and I realize the extreme power the state has in any condemnation or corporate or public entity, whether it's been a park district or sanitary district or a drainage district, I understand all that and that's why the law says that because they have this tremendous power it has to be for a public purpose and not private gain. And I cited the cases and I'll get to those in a minute.

So we took Mr. Etzenbach who told you under oath it was for private gain and use because it was truck traffic flow, nothing for public use. We had Donald Kowalczyk who testified as the Peru Public Works Superintendent that no one ever questioned him, no one asked his advice, they never asked his advice on how to design it if

they were having a truck problem. And that there was no problems in all his time he's ever been a couple months short of twenty years as Director of Public Works for the City of Peru.

Then we had the Peru Police Department testify there's no problems whatsoever. Which is when the burden shifted to me I brought in the evidence for the Court -- to show the real issue behind it.

And then we had the Alderman Currie who said what he said. And then when I cross-examined him I said, do you have a degree in safety engineering? And he went to high school and went one semester to junior College, and, of course, he had no training, no courses of any kind and he couldn't give an opinion as to any safety questions.

Then we come to the second alderman who testified here and that was Mr. Potthoff and Mr. Potthoff said that, on page eleven of my motion, and this is under questioning by cross-examination of Mr. Hintz at the bottom of eleven:

Okay, so the problem you have with that is the fact that the Mirror Building was rented out to IVCH for their use?

Answer:

No, the problem I have is the city expending money for what I feel and have felt as a useless project by condemning 821 Peoria Street.

And then on redirect on the next page, I said, question:

Mr. Potthoff, you indicated when asked questions about the parking because of the office space and in the Mirror Building and the acquisition of 821 -- of the 821 property, was a useless project because of that fact, is that correct?

And he answers:

That's true.

So here we have a member of the governing board of the City of Peru who was also aware that this was being done and he said it was a useless project to spend taxpayers' money to benefit the private individuals.

And then, Your Honor, I think you have to understand that the entire approach to the basis for the city saying that they needed to revitalize the downtown Peru area was the fact that they wanted to increase the sales tax base and the Court has the exhibits introduced by the plaintiff, which is Plaintiff's Exhibit 7 which is this plan by this organization from St. Louis and this master plan.

And in Plaintiff's Exhibit 5 in the master plan, the appendix that

was put in there has an analysis of the retail sales of Peru, Illinois, and there is six pages analyzing what the sales tax is for the City of Peru and the City of Peru in 1901 was in the top number one spot for the State of Illinois as for the amount of sales tax generated for the size of the city. We have a city of a population of 9,000 and we are generating $3,000,000.00 worth of sales tax and it doesn't take a rocket scientist to figure that everybody that lives in Ottawa or Mendota or Princeton or within a radius of 60 miles not a resident of the City of Peru, comes to the Peru Mall and we happen to have probably the most concentrated area of new and used car dealerships across from the mall, so naturally we are going to get all the sales tax money because where they are making the sales on properties incorporated within the city limits of the City of Peru. So we -- that, by their own exhibits destroyed the argument that that's why they needed to revitalize downtown Peru.

But if that isn't enough, the argument that I mean the testimony of the mayor and of Alderman Potthoff to support it, was that the city had made an informal arrangement with all the merchants in this downtown area that if they fixed their property they were going to get rebated 50 percent of the sales tax. And when I asked the question, how do you know if the downtown area is increasing or decreasing in sales tax? And I brought the City Clerk in and the City Clerk said, I don't know. All we do is get one -- a figure a month from the Secretary of State's Office saying what our sales tax is, and I couldn't tell you what business goes up or down. So I don't know how they are making this arrangement. But here again, abuse of power? If they come into the court and tell the court, and that's the doctrine of clean hands if they come into court and say we want this ordinance to be valid because we want to revitalize it to increase the sales tax on one hand and, on the other hand, saying, well, now, if you go along and put all these lines in and do all this that the plan says and this outfit from St. Louis says it should be, we'll give you fifty percent of our sales tax back. There's never been a formal ordinance. I just don't know how they can work with public funds in that manner but it's not my determination to make there.

But the point being, Your Honor, is that we come now to the question of after hearing all that evidence, what is the law? And I cited to the Court the very first case, Libbee v. Imhoff, and it was almost as close as you could get but this is an old case compared to -- by the way, none of these cases I cited have ever been reversed or overturned. Libbee said, "A roadway", quote, "to provide access to

tract of land isolated from any public road would be for the sole benefit of the owner of such land and those having business with him and such roadway could not be laid out over lands of others under statute authorizing public authorities to lay out roads for public and private use, since to do so would amount to taking of private property for a private use in violation of the Constitution." Now, I realize that Kotecki is not a farm but listen to -- just substitute what's involved here in the Libbee case. A roadway to provide access, and this is coming through the parking lot to provide access from a public road which is 5th Street, for the benefit of the owner of the land which is Debo's and Letterkraft and those having business with him. That's the delivery. So they want to condemn Mr. Kotecki's property to do just exactly what -- and Libbee, the Supreme Court -- I'm sorry, this Appellate Court said couldn't be done.

Then I cited to the Court two other cases, there are a number of them in here, but the two that I cited that are I think most apropos is Limits Industrial Railroad Co. v. American Spiral Pipe Works. I think it was 1910 or 20, in that range, but it's a Supreme Court case. It's never been overruled. In that case the -and railroads were very powerful then, they wanted to build a factory because they would get more shipping because where they initiate the shipping you get the most money for your freight because when it switches to other lines they have a way of sharing the costs and all that, so they formed a special corporation to make a special railroad company to build the spur seven to ten feet long only so they could get from the factory to the main line. And so they had to cross the land and had to condemn the land. And the Supreme Court said on page twelve of my brief in support of my motion, quote, "The use that will justify the taking of private property by the power of eminent domain is the use by or for the government, the general public, or some portion of it, and not the use by or for particular individuals or for the benefit of certain estates.' And that last phrase is apropos with the Kotecki property. They want to take the Kotecki property for the particular benefit of Debo and Letterkraft and the business that's generated there.

THE COURT: Who is going to use -- if they condemn the Kotecki property, who is going to use the Kotecki property? The area where the Kotecki property was?

MR. OLIVERO: Well, I mean, I would assume that it's, because of the design of the plan, that they put some -- in this Exhibit Number 9 they put a couple spaces in there, but in the mayor's and the question by Mr. Hintz he said, and the letters with Mr. Kotecki, that

they wanted to get access to this dock here of Letterkraft, and that Mr. Zukowsky who has the building here, he was -- he had to give up some parking spaces back here (indicating) so they wanted parking spaces on this side for his building.

THE COURT: They are going to use the area that Mr. Kotecki is, they are trying to condemn for parking, right?

MR. OLIVERO: Only because

THE COURT: I understand. One question at a time.

MR. OLIVERO: Yes.

THE COURT: The area they are trying to condemn

MR. OLIVERO: Right.

THE COURT: -- is going to be used for parking, right?

MR. OLIVERO: But --

THE COURT: I mean, that's the plans.

MR. OLIVERO: That was their plan.

THE COURT: You could park your car there, am I right? I could park my car there. Anybody in the world could park their car there as long as they got there when there was still a spot. Is that for Debo's trucks, that area?

MR. OLIVERO: Wait, Your Honor.

THE COURT: I understand what you're going to say, there's a connection, but I'm trying to zero in on that one issue. The cases you're citing, the property to be condemned, that specific property is going to be used for private use. In this case the specific property to be condemned is going to be used for public parking.

Now, your argument, I'm not -- I understand your argument. The only reason they need it for public parking is because they are using -- they are going to take some other property and they are going to use it for a private purpose.

MR. OLIVERO: That's right.

THE COURT: And, therefore, there's a private purpose. But the specific property that's being condemned here, I think I want to make that distinction between some of the cases you're citing, is being used for a public purpose.

MR. OLIVERO: Your Honor, I'm not disputing that, honest, I am not.

THE COURT: Okay.

MR. OLIVERO: Okay. Listen to what my argument and my response is to you.

THE COURT: Okay.

MR. OLIVERO: It's the purpose that's behind this. The

necessity. Is it a public purpose? So, in order to create the private truck route which is the purpose of the condemnation, that's privately for the benefit of Mr. Debo and Mr. Dudek at Letterkraft. The fact that on the property of Mr. Kotecki that they are taking they are going to put some public parking spots and anybody in the public can go there, that you see that's -- doing indirectly what you can't do directly, and that's what that Limits case held, and I cited that. That the purpose, the Supreme Court said, listen on page 14 what the Supreme Court said in the -- in the Limits Industrial Railroad case, and I cited this: "If private property cannot be condemned directly for the purpose of a spur-track reaching a particular industrial plant or tract, the proposition can scarcely require argument to support it that the law will not permit this identical thing to be accomplished indirectly by the subterfuge of organizing a railroad company for the ostensible purpose of constructing and operating a railroad between the railroad already existing and the plant." So they can't do it indirectly by now saying, hey, look at how you can do this, we can do it -- the whole theory is let's condemn Mr. Kotecki's property and say we want to expand the parking lot because we have the right to do that because this is a sacred cow, this is public parking and nobody can ever argue that, so that's what they did. But under the subterfuge of taking Kotecki's property for public parking they put in this 28 foot strip of roadway. And what's interesting, Your Honor, and I think that this is a crime, or a shame or whatever you want to say, crime may be a harsh word, the burden on the people who want to do this have never presented one fact as to the cost of this project at the taxpayer's expense for the benefit of deliveries to private people. And if the Court will recall when I was trying to get that information out, even the Court said the cost of condemnation is included in there. Can you answer the question? And the guy said, no, I can't. So here it is, they want to come in and take Mr. Kotecki's property and we don't know, the taxpayers of the City of Peru whose money is involved and the Court who has to pass judgment on this, is completely barren of this record as to what the cost is going to be for this 28 foot private, truck traffic flow more the distance of it, the total distance or the cost. And I put in my brief, because the Court can take judicial notice of the fact that it's a fact that when they have contracts for an intersection which is two twelve foot lanes, it's a half a million dollars a mile or a million dollars a mile when you take in both lanes east and westbound. And so if you're going to put in to carry the weight of a forty foot weight tractor, it's unreal.

The second case that I rely on that is third, rather, is Shall v. German Coal Company. Again, a Supreme Court case. And page twelve of my brief it says in Shall, quote, "The character of the business proposed to be done, the manner of doing it, must be looked to in determining whether the use will be a public or a private one. If, from the nature of the business, and the way in which it is to be conducted, it is clear no obligations will be assumed to the public, or a liability incurred, other than such as to pertain to all strictly private enterprises, it may safely be concluded that the use is private, and not public." Now, that's the Supreme Court talking.

And I submit, Your Honor, that the evidence that I have brought to show to the Court that what the city is trying to do here is first an abuse of their power; and second, it's for a private purpose and not a public purpose. And the evidence is just overwhelming that, I mean, I've sat and I've went through this and the Court has taken copious notes, I'm sure, and I have not heard one witness on behalf of the plaintiff that said that this was a public purpose. They want to use the idealistic language and in the ordinance they say it's necessary to do this.

I pointed out that there has been no resolution authorizing this project. There was a Plan Commission and the testimony there shows that they were not going to benefit the public at all, they were going to lose more spaces than they already have, I imagine, after condemning Mr. Kotecki's property.

Your Honor, I submit that the facts are that the defendants are entitled to a directed verdict in Count I of this complaint and it should also be dismissed.

THE COURT: Thank you, Mr. Olivero.

MR. OLIVERO: Thank you, Your Honor.

THE COURT: Mr. Hintz.

MR. HINTZ: Thank you, Your Honor.

Your Honor, the first thing I want to bring up is the fact that the statute that we are going under is the Downtown Redevelopment Act, clearly states that it is a public purpose to revitalize downtown business district. You've already ruled on that, Your Honor, that is constitutional and that's a statute that the City of Peru has gone under. You can't get around that. I mean, the legislature has stated that it is a public purpose and that's what the City of Peru is trying to do.

Now, how do you revitalize downtown business district? Do you let things stay the same or do you try to do something? I mean, that's what the defendants are suggesting, that don't do anything. Let the

downtown business district die. It's dying, let it die. That's evolution. So the mall, let the mall pick up the sales tax ball and run with it. Well, that's not what the City of Peru, City Council and the mayor have been charged to do. They have been charged to protect the public, to help the City of Peru, and they are attempting to revitalize the downtown business district by use of this statute by revitalizing the downtown business district they have determined that a -- that this parking lot project is necessary for the City of Peru. It's necessary for the public for parking. Segregate it from the downtown businesses and the truck lanes and it's also necessary for the businesses in order to support the businesses, keep the businesses there and provide a good basis to attract new businesses to the downtown business district. Again, the legislature has stated that this is a public purpose and that's what the City of Peru is trying to do.

You've heard the testimony and the evidence and you've heard that the parties that I brought to testify that believe that the parking lot project is necessary. The City of Peru has decided that it is necessary and that's important because it's the City of Peru that makes the determination as to what is necessary.

What we are here for today, Judge, is to determine whether or not the City of Peru has abused their discretion, have abused their authority, and I submit that there has been no testimony whatsoever saying that the city -- that the City of Peru has abused it. There's been no testimony that there is any kind of abuse of the discretion.

The only testimony that possibly raises some kind of a question is by the defendant himself, Mr. Kotecki, and as I brought out on cross-examination of him, he didn't even mention that when he was conversing with the City of Peru as far as the parking for Walter Zukowsky, which is, you know, ridiculous. The defendants are merely attempting to substitute their own opinions here, Judge, as far as what is necessary for the City of Peru and this is not allowable. The City of Peru makes a determination as to what is necessary and they can't. And they don't agree with it, which is understandable. He owns the property. He wants to keep it but the City of Peru makes a determination what is necessary for the general public and what is necessary for the redevelopment and what is necessary for the parking lot.

Now, Mr. Olivero has been arguing throughout this whole proceeding that the parking lot project and the redevelopment project is a private purpose for private gain. He had testimony when his turn to bring his witnesses in, he brought Alderman Potthoff. Alderman

Potthoff has been very clear, he never believed that the parking lot project was useful. He said it was a waste of money. I want to point out, he is only one member of the Council. The Council as a collective whole made a determination that it is necessary. And he has an opinion as to that but the City of Peru Council has determined, the legislature of the City of Peru has determined that this is a necessary item. And I must also point out that his only objection -- he voted for the redevelopment project, he's all for redevelopment, and he testified that he knows that the parking is necessary, that sometimes the parking lot is full there, and he also will approve the acquisition of a couple other lots that are outside the redevelopment district but to produce more parking. There's no question that there's more need for parking in downtown Peru. There's no question there's a need to revitalize the downtown business district and all, the Alderman Potthoff agrees to that.

The parking lot, as you most aptly point out, the parking lot is going to be used by the public. it's not for private purposes. Sure, there may be customers of the business houses that are on 4th Street that may be able to park in there to go there but this is all part of the downtown revitalization project. We have to attract and keep what we have as far as businesses there to make sure that we have a good tax base. There's been arguments that, you know, leasing out the second floor of the Mirror Building to a hospital maybe doesn't produce any sales tax but as I pointed out in my argument, this -- you know, a new building, an occupied building will be more -- do more to attract business than an empty, old business without anything in there at all. And this is something that there's no question about.

And the parking lot, I'll point out, there was ample testimony here that the proposed parking lot plans are going -- is going to be safer for the public. It's going to look better, which is part of the downtown redevelopment plan. And I think there's adequate evidence before Your Honor that this is a public purpose that is necessary and there's not abuse of the governing authority's discretion.

I dropped off to yourself and also to counsel a copy of the case, Lake County Forest Preserve v. First National Bank case which I believe states the law very clearly. It says that absent a clear abuse of the authority the Court will not inquire into the needs or propriety of its exercise and they are citing Department of Public Works v. Keller, which is a 1975 Supreme Court case. It becomes the burden on the defendant to show there was abuse of discretion and the question is whether the defendant showed a clear abuse of discretion

by the district or in this case the City of Peru, and I submit, Your Honor, that they have not done so. What the defendants tried to do in that case is they tried to submit -- substitute their own opinions that the taking of certain property for the forest preserve district was not necessary, that there's already enough property for the forest preserve district. It's very similar to the argument made here that counsel is trying to bring out that there's enough parking lots in the City of Peru. Virtually mirrors his argument.

He pointed out in his argument and also in his case, that he called Donald Kowalczyk and Lieutenant Znaniecki to the stand. And in trying to prove that somehow the fact that these people were never consulted as far as the plans proves that there's some kind of an abuse. Well, these people are not members of the governing Council of the City of Peru. These people do not make the determination. Mr. Kowalczyk merely maintains the parking lot in its present shape. He doesn't redesign the parking lots, doesn't make the plans to redo the mall. This is something that has to be done by the legislative body.

And Officer Znaniecki, of course, nobody is going to consult him regarding the propriety of the parking lot project. All he was testifying to was as to the safety, the number of accidents. He testified there were about fifteen accidents. Counsel was saying, well, that's not enough. Well, I submit that fifteen accidents certainly is enough to try to provide for a safer access for the public in that parking lot. Fifteen accidents is nothing to sneeze at. Why do we have to have any accidents? There may not be any personal injuries involved but shouldn't we try to provide or prevent fender benders? I don't understand that at all.

Counsel also goes into the argument regarding sales tax, that there may be no increase or no demonstrable increase in the sales tax since the beginning of the project. Well, the project is not done yet. This is considered to be a twenty-year plan. We are still trying to get this project completed. Part of this project is the parking lot. We have already completed a lot on the project but we are not going to notice anything until after this plan is done. After we are able to finish this and present this to new businesses to come in. We don't know if it will be effective or not but in the wisdom of the City Council they believe this is the way to go rather than sit back and do nothing, they have to do something., You heard ample testimony from all the witnesses that I provided that the downtown business district was deteriorating. They may not have been experts on the definition of

conservation area and they may not know the legalities of the downtown plan or why -- what language is put into that downtown plan was there, but they all testified that something had to be done, that the downtown business district needed revitalization. And counsel can't argue that -- I mean, he says there's been no factual evidence presented but that certainly is not the case.

Counsel admits in his argument that the sales tax is coming from the mall and from the auto dealers today and not from the downtown area. Everybody, you know, has testified that where the taxes are coming from right now. That's what we are trying to prevent, we needed more taxes from the downtown business district. Just because we have sales tax coming in now doesn't mean we can't have more. Doesn't it mean that we should have more and prosper rather than be satisfied with what we have? I don't understand that argument either.

And he brings up the fact that there are sales tax rebates right now that the City of Peru is in partnership with some of the businesses to rebate some sales tax in order to go ahead and provide for some improvements with the businesses. Well, that's very well, you know, you go ahead and substitute your opinions and say that's a waste of the taxpayers' money but the City of Peru has decided that a short term loss is certainly acceptable for a long term gain. And to keep and attract new businesses and to improve the facilities that are in the downtown business district, it's reasonable. And then he says in his argument it's not his determination to make as far as whether or not it's reasonable or not. Well, you're right, it's not his determination, it's the City of Peru's determination, Your Honor, and that's what they are trying to do is suggest that they should have some say so in what the City of Peru should do. Absent a clear abuse of their authority, they can't go into what's necessary or not. It's the City of Peru's determination.

They also suggest a couple cases, Libbee v. Amhoff which is an abstract opinion, doesn't tell you what the facts of the case are. There's no case, just the head notes is all it is so I can't -- you know, you can tell somewhat what the facts are but really certainly not enough to apply to any of these cases.

And, Your Honor, I submit to Your Honor that the City of Peru has proved that the -- and Your Honor has ruled that we have made a prima facie case that they have the authority to do that and that it's a public purpose and it's necessary and the defendants have not proved there's been any type of abuse of that discretion.

Thank you.

THE COURT: Thank you.

Mr. Olivero, a brief response if you wish to.

MR. OLIVERO: Thank you, Your Honor.

First of all, I'll take the very last thing first. My pointing out to Your Honor about the rebate of the sales tax when I said it's not my determination, personally from my experience in practicing law and, of course, it's my opinion that having been the city attorney I do not believe that any governmental body can rebate any money without either going to the public with a referendum or passing an ordinance and publishing and let the people know what the taxpayer money is. That was my determination, it wasn't about whether or not this was sufficient to condemn the property. We'll get to that in another matter. But he said a short term loss for a long term gain. We had testimony that the Mirror Building has been in existence five years and the first floor is still empty. I don't know, when we talk about abuse of power, do you -- the abuse of the power is that government. The Council doesn't have the right to play with that money like you play with monopoly money. And the question of whether or not they can rebate is really a legal question that nobody has ever challenged them because they said -- because Your Honor I'm sure has to realize how expensive it is for Mr. Kotecki to defend his rights and how I agree and what the law is that the king can do no wrong, so we start with the premise that the government, can do no wrong and they have this power to condemn. But what the Constitution says, and this is -- I waited all through the argument and I heard nothing from Mr. Hintz as to abuse of power and was it necessary. Those are the two key issues in any condemnation case.

And then he talks about Mr. Potthoff saying about he voted for all this. That's right. He voted for buying more parking spaces, and as to answer Your Honor's question, he said they bought a lot on the north side of 5th Street. Just put it in for public use because that's a public purpose if it's a parking lot and they can park there and instead of only having to walk 200 feet, they have to walk four hundred feet. But it's still parking for the downtown area but they chose in order to do that, did they, Your Honor, they chose not to use the land they already own by the testimony of the mayor and Mr. Potthoff that they own two lots on the north side of 5th Street where they said they could use for parking. They chose to take Mr. Kotecki's property, and it's not for public purpose, as I pointed out, and this is in evidence. This is not me talking, these are exhibits offered by them in evidence that this whole thing is for private use and no other

purpose. They can argue all they want and say they are going to park a car over here but the whole purpose of taking that is to make this truck traffic flow safer for what? The purpose is for public use? No way. The purpose is for private gain by the people that are going to get their merchandise delivered and merchandise picked up and removed so called without having to have their poor semi drivers back it up and all they have to do is drive in forward. Now, if that's a public purpose then I guess I should go back to the University of Illinois and start all over again from scratch. Because it's not a public purpose.

The record is amply produced and that was my burden and I met my burden. I brought into the court the evidence to show the Court that it wasn't at all a public purpose and then they cite this case of the forest district. Your Honor, this is why, I mean the law is technical. And I attack this and you have already ruled, but it's so technical, Your Honor, we .have division 74.2, 74.3, 74.4 and the municipal code about this redevelopment, commercial, and 74.2 and 4 have got pages and pages of methods of how to proceed to have hearings and public hearings and what is to be blighted and all that. And in 74.3, which there's only four sections, it's in my brief there and there's none of those definitions and it's all started not in the municipality codes but Chicago got it in 67 1/2 under the Urban Redevelopment Plan where they started this because of all the slum areas and it's moved into the municipality code. But if you trace the history of it and even under the Urban Development Plan they had all these safeguards for the necessity and public use.

But let's take the only case they cited, they cited this case of Lake County Forest Preserve v. First National Bank of Waukegan. There the county's forest preserve district that has the power to condemn, sought to add 500 acres to the present existing forest preserve, and the City of Waukegan objected because they thought it would be best for commercial use. And the court said, no, a forest preserve district is a public purpose. The people have a right to go bicycling, riding, fishing, swimming, do all that, that's the public at large. If that isn't clearly distinguishable from two semi -- two private houses having semi deliveries being made available to them, then again I should go back to law school. Because clearly this case is so distinguishable; and, second, it's not even under the same statute that we are faced with, that the public body does have a right for future development. I don't think anyone with any common sense could argue they don't have that right. But those are facts that are far, far from the facts

before you, Your Honor.

I submit I'm sure the Court listened to all the arguments and listened to all the facts, the evidence is here, they can't get around the fact that the testimony that Mr. Etzenbach said it was for truck traffic flow only and this is their witness and their engineer. They can't get around the fact that the testimony was for the purpose of only delivery of the truck to pick up and deliver and they can't get around the fact that the Superintendent of Public Works and Alderman Potthoff said that it was a useless project. And then what was most interesting by Mr. Hintz' comment was he said that the members of the Council make the determination. And my rhetorical question that I wrote on my note, Your Honor, was what facts did they have to make the determination? They had the burden after I raised the traverse. Did they bring to you any mean, you don't make -- they didn't build the LaSalle County Courthouse out there in the north end just because they decided to do this. This very same project here. They had studies after studies and hearings after hearings and they got the money from the government and they started it out with the jailhouse, but the point being is they had to go through all the reasons as to why, and what is the necessity of doing that? Here they didn't bring anything in and he says, you know, we can't call on Mr. Kowalczyk. Well, why have a Superintendent of Public Works? Why should -- why do taxpayers pay for a person with all these duties and know all these things if they are not going to call him in and say do we really need this? And what did he say? He said we didn't. He said take good care -- the Court looks -one of the exhibits here, Your Honor, I think it's Defendant's Exhibit 4, that blocked area of the ten block area there's so much parking there it's unreal, both public and private. So when they argue about this sales tax for purposes -- there's no dispute they could go in the north side of 5th Street and condemn the whole block if they want for parking but not to have what they have done here, take the present parking lots, condemn Mr. Kotecki's because they have to make this private truck run and say, well, because you can park there, this is a public purpose, because I pointed out they can not do directly what they are prohibited from doing directly.

I just don't know any more I could tell Your Honor, but the evidence is very clear to me that it's a clear abuse of discretion, abuse of power, and it's not a public use at all. It's a private use. There's no necessity for this at all.

Thank you.

THE COURT: Thank you, Mr. Olivero.

The Court finds the following to be the facts: The City of Peru, pursuant to Chapter 65 ILCS 5/11-74.3-1, Business District Development and Redevelopment Act, passed an ordinance creating a Business District Development and Redevelopment Commission. Now, prior to the time the city had done that the mayor and members of the Council had determined that they wanted to get a study done for the purpose of revitalizing the downtown area. The mayor's quote was, he didn't want downtown to be a ghost town. He wanted to develop downtown and improve it and attract businesses. So the Council hired an expert, PGAV, to go out and do an analysis. Now, we've had a lot of testimony in this, let's put – not a lot of testimony but a lot of questions raised as to how do you interpret what PGAV did. But if you look at the reports, they did fact finding things, they talked to people and they analyzed how old property was, they did tables on sales tax. I mean, they went out and investigated this and came up with a report. Following the preliminary report, the Council passed a resolution as an ordinance, as I just pointed out, pursuant to this Chapter 65, Business District Development and Redevelopment Act, and established the Commission. The Commission published notice that it was considering recommending the boundaries of a business district. Public hearings were held. I think there were three public notices published. They are all in the record. Everything. And the Commission, and every public hearing where a lot of people came and it's all in the minutes, gave their input, recommended to the Council the creation of this district, PGAV drew up a detailed plan, and it was submitted to the Council along with the recommendation of the Commission and the Council in ordinance 2904 adopted the plan and created a business district pursuant to this chapter and this section. And one of the powers in the statute and in the ordinance was to exercise the use of eminent domain for the purposes of certain projects, development or redevelopment projects.

As I pointed out when I ruled on the motion for directed verdict at the end of the plaintiff's case, the original plan which was developed by the PGAV and approved by the Council, contemplated the acquisition of this property and the expansion of this parking lot. So this was part of the plan that was developed when they first adopted it and the question was raised was there any facts ever presented. And the answer is, that's why they hired the consultants. The consultants went out and interviewed people. That's why they had public hearings. Now, maybe they should have talked to

Kowalczyk, maybe they should have talked to the police. Maybe their hearings weren't as thorough as they could have been. The point is they did go out and hire an expert and did have hearings and they did pass a statute.

Now, once they did that, the Commission recommended, in October of 1991 -- let me look at the minutes here, the Downtown Business District Development and Redevelopment Commission met on October 7th, 1991, at that meeting they considered on page 2 of the minutes this particular issue. There was a motion to build a building and there was also a motion to acquire some property. This property is at 821 Peoria Street. And the testimony is that since that time there was some negotiations and the negotiations have fallen through and that's why we are here.

Now, those are essentially the facts of what's happened.

Now, let's apply that to the law. And, you know, both sides have submitted a lot of authorities and I want to thank both sides for their diligent efforts and there's a lot of serious issues in this case. Essentially, the city has made a decision as part of their business district plan to improve this particular alley behind various business houses for truck flow. That's certainly a primary consideration here. There has been testimony, and I don't think it's frivolous testimony, that there is a safety concern. I mean, you don't have to have an accident. Somebody doesn't have to get run over before you have a safety concern. Backing semis through alleys is not a safe way to proceed. There was some testimony on that issue here. And they wouldn't have to do it. So for both truck flow purposes which appears to be the primary reason to assist the business, and also for safety purposes, and because it was recommended by the consultants who did a study and analysis here, the city has decided to improve this alley. Now, this is going to benefit the private businesses as well as provide some better safety for the parking.

Now, having decided to do that, having decided to go along with the recommendation of the consultant, having decided to improve this alley, having decided to assist these businesses and to make a safer situation also, the city now decides whether or not by using up these parking places it needs more. Now, defendant's property is in the parking lot. It's right adjacent to the parking lot, it's the same block. It's not like they went out to try to find a place that wasn't connected to the parking lot. This is right there. So they have decided that since we are going to do this project, we already are short of parking. We want to use this other spot, the defendant's spot for parking.

Well, that's the facts.

Now, let's look at the law of eminent domain. Does the city have the authority to exercise the right of eminent domain? It's disputed in the sense that there's an argument been made that the statute is unconstitutional and too vague and I ruled on those arguments, so based on my ruling, yes, they have a right to exercise the right of eminent domain. A statute has been passed by the legislature giving them that right. They passed an ordinance. They complied with the requisites of the statute so they have a right to exercise the authorities of eminent domain. Is the authority being exercised in a legislative fashion? And the answer is yes. The city did pass an ordinance and I'm not going to repeat myself but they went through the steps the statute required. They formed a Planning Commission, the Planning Commission met. The Planning Commission developed a plan. Recommended to them the plan, they approved the plan. The Commission recommended this particular step be taken. They approved that. So they have gone through a legislative procedure here. They have voted in open public session, a majority vote of the City Council, the elected representative of the City of Peru.

While I'm on the subject, there's an argument that they are wasting taxpayers' money. I don't know if that's the purpose of the eminent domain statute and the traverse and I'm not here to try to analyze their fiscal responsibility. All right. And while I recognize that counsel is a resident of the City of Peru and he might be aggravated by the way they are spending their tax money which could benefit him as a resident there, I don't know that that's the job of the Court to micro-manage their finances and I don't think it's a question of whether or not it's a wise expenditure of public funds.

So they did a legislative position here, the City Council open session votes, there's a specific resolution on this particular property, in addition to approving the entire plan.

So, now, having done that, having passed the legislation with authorities, is the property for a public use and is it reasonably necessary? Well, let's start out with the statute. The statute that they are operating under says, the exercise of the powers provided in this division is dedicated to the proposition of the public interest and enhancement to the tax base of the business district and the use of such powers for the development and redevelopment of business district is hereby declared to be a public use essential to the public interests. Now, as a general rule, the determination of what is the public use and what are public purposes are questions to be cited in

the first instance by the General Assembly. So whether the General Assembly in Springfield says if you are trying to help businesses here and enhance the tax base, we are saying that that is a public purpose. That has to have some persuasive authorities on the Court. Because that's what the General Assembly said. The plan, this was all being done pursuant to a plan for the overall business district. This wasn't something where they singled out, we're going to help this one merchant, no, this was an overall plan that they had developed. A Commission voted in open session to do this. As I pointed out, I understand the argument that they wouldn't need to do this but for the fact they are trying to improve, maybe they wouldn't need to condemn Mr. Kotecki's property. Mr. Kotecki's property is not going to be used for a private use. Mr. Kotecki's property if it is condemned pursuant to the use they are suggesting is being used for parking, the public will be using this property.

Is it reasonably necessary? Well, there hasn't been much dispute here that the parking lots are fairly crowded, and Mr. Kotecki said that, just about everybody has. Some days they are not full. We can argue as to why they are not full or are full. Perhaps they shouldn't have rented this building or they should get a parking lot or people should walk farther, but generally the parking lots are full. And the Court is not going to be able to micro-manage, well, there's enough parking in the city. That's the same argument that was made in the case that has been cited by the city here. There's enough forest preserve already. You've got 500 acres, why do you need my three? That was exactly the argument made. It's a sympathetic argument. You've got enough parking, why do you need to take my house for a parking lot? But, generally speaking, there's been no clear abuse shown on that particular issue because there's parking. There is a shortage of parking by most of the testimony. It's not like there's -- the lot is empty. I mean, the city really could come in here without making this alley improvement if they had done the requisites of Count II correctly just for parking. The Planning Commission could say we decide we need more parking and we're not going to fix this alley at all but we're going to expand the parking lot. And if they published the notice on this, here is where we're going to expand it, and we're going to take the parking lot, it's contiguous, it's the easiest piece of park property to work with and they would have a very good chance of proceeding in that fashion and the city could fix the alley without taking the alley. They could fix it up and expand the alley and build the lanes for the trucks and they could leave Mr. Kotecki's

house there and a year from now they could come in and say, wait a minute, now that we fixed this all up and have a nice, safe parking lot and the trucks are flowing through here we are out of parking so we need more parking.

So the Court finds essentially that the city has made a prima facie case, as I found before, that it's for a public use, parking, and even the assistance to the business is a public use under this section of the statute.

And this is being done for three reasons, the convenience to the businesses in the area, for safety, and part of the overall plan to redevelop the downtown area and defendant's property is going to be used for parking. I don't know if this is the wisest decision or the best decision or whether if I were on the City Council if I would vote for this or not. I might not. Mr. Potthoff doesn't think -- he thinks it's a waste of money, all right, that's what he's thinking. He is certainly entitled to do that and he's an elected official of the City of Peru and if there were three or four more on the Council that agreed with him then we wouldn't be here right now. Mr. Hintz' point is well taken, the Court cannot substitute its opinion for the City of Peru. I may not agree with this, I'm not going to say if I do or not, if I think this is a good idea or even fair, but is it clearly abuse of discretion by the City Council to do this? Given this statute and given the power given by the legislature and the reasons they are doing that, given the fact that it's an overall plan for the downtown development, given the fact that the defendant's property will be used for public parking, that there's a basis to improve this alley for the benefit of people and possible safety, I cannot find that the city has clearly abused its discretion in proceeding in this fashion with this plan. So since I can't find that, I have no other choice but to deny the traverse and the motion to dismiss.

Now, having done that, the next step is to determine compensation. What are you going to need to do, another appraisal? Update the appraisal?

MR. HINTZ: We may have to update the appraisal and we may have to get another appraisal.

THE COURT: How long will it take to do that?

MR. HINTZ: Probably 30 to 60 days. Maybe even less.

THE COURT: Mr. Olivero, I would assume that you may want to get your own appraisal and perhaps depose his appraiser, conduct some discovery on the issue of appraisal?

MR. OLIVERO: Correct.

THE COURT: You certainly would have the right to do that. I don't think, however, you can take too long. I don't see really any other special issue here other than the appraisals here as to -- you're not talking about anything tricky as far as value here, I wouldn't think.

MR. OLIVERO: The only thing left --

THE COURT: What is the piece of property worth, and it's a residence/office building located on a city lot so, I mean, I don't see anything that should be tricky as far as -- my hope would be to try to wrap this thing up and go to a jury in about three months or maybe shorter if you can do that.

MR. OLIVERO: The only problem, Your Honor, is the private practice of law, like the scheduling.

THE COURT: I understand, but I would like to wrap it up within 90 days, unless you can resolve the amount here, and I don't know if you can resolve the amount without waiving your right to appeal my ruling that I made today. You might want to look into that because maybe that would shorten this proceeding up. I mean, there may be a way for you to agree on what the compensation is without waiving your right to appeal this particular issue. Maybe you could agree on that. I don't know, I haven't researched that, I just thought of that as I'm sitting here now. And you could contest my ruling here but you wouldn't have to have another trial and spend more money on what the value of the property is worth. You might want to look into that.

In the meantime, I'm going to order you to furnish Mr. Olivero an updated appraisal within thirty days. Okay?

And I'm going to order Mr. Olivero to furnish any appraisal he wants within thirty days thereafter and I'll allow you thirty days to take a deposition if you want to of these appraisers and we should be able to come back here in June and have a trial. There is a jury demand in this case so we would have to have it in front of a jury as to the value of the property.

MR. HINTZ: Do you want to set the trial date now, Judge?

THE COURT: Yes, I would like to do it.

Mr. OLIVERO: I would suggest first a status to find out where we are at.

THE COURT: The problem I have with that is just what you said, you are a busy attorney, Mr. Hintz has got a lot of things, my being able to get you here in June is a lot better than in May. If I talk to you in May you're going to say your next available date is September.

MR. OLIVERO: Oh, I see.

THE COURT: So we have some available dates in June right now. Perhaps you could contact your office. We have the 23rd of June available right now.

MR. OLIVERO: I just used that up this morning downstairs.

THE COURT: Okay, well, --

MR. HINTZ: I'm available on that date, Judge.

THE COURT: Well, Mr. Olivero is not.

MR. OLIVERO: I just told him I have something downstairs that I set this morning at 9:30.

THE COURT: Well, I could have this on the 7th of July, too, because this isn't going to take long. It will be a short trial. So we could do it on the 7th of July or even on the 14th of July. So why don't you check your dockets on that and we could set a trial date one of those dates in July hopefully, the 7th or 14th of July. And let's come back here on a status in 60 days and I expect both of you to have exchanged appraisals by then, okay, pursuant to this court order and at that point if you're sure that's taken care of. You might want to think about it if it's possible, I don't know why it wouldn't be, to agree on something along the lines I thought about. If you can agree on a compensation without Mr. Kotecki waiving his right to challenge this, you can do so. Perhaps we could avoid another trial. Okay?

MR. HINTZ: Sure.

THE COURT: Okay.

MR. OLIVERO: Thank you, Your Honor.

(At which time court is adjourned for the day.)

CERTIFICATE

I, Beth M. Bute, duly appointed and qualified shorthand reporter of the Circuit Court of LaSalle County, Illinois, do hereby certify that the above and foregoing is a true and correct transcript of the notes taken by me in machine shorthand, and evidence offered in said Court, in the matter of the Proof in the above-entitled matter, which testimony was taken on the date heretofore given, and I verily believe said notes to be correct and to be full and complete transcript of all the evidence offered or introduced in said matter.

/S/ Beth M. Bute

OFFICIAL COURT REPORTER

L.

The written order entered on April 22, 1997, by the Honorable James A. Lanuti, of Circuit Court for the Thirteenth Judicial Circuit, LaSalle County, Illinois, set forth the following:

THE UNITED STATES OF AMERICA
STATE OF ILLINOIS COUNTY OF LASALLE
IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

City of Peru

-vs-

Kotecki Case No.: 95-ED-3

ORDER

This matter coming on to be heard on Defendants' Motion to Reconsider, the court having heard the arguments of counsel.

It Is Hereby Ordered that Defendants' Motion to Reconsider is denied for the reasons stated on the record.

The status of April 29, 1997, is stricken, status is reset to June 5, 1997 at 9:30 A.M.

Dated: 4/22/97 /S/ James A. Lanuti
Judge

M.

The transcript of the April 22, 1997, hearing in the Circuit Court for the Thirteenth Judicial Circuit, LaSalle County, Illinois, containing the oral arguments on the defendants' motion to reconsider and the ruling by the Honorable James A. Lanuti on said motion, indicated that the hearing proceeded as follows:

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

LA SALLE COUNTY, ILLINOIS

CITY OF PERU,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. 95-ED-3
	)	
DONALD KOTECKI, ET AL,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on April 22, 1997, before JAMES A. LANUTI, Circuit Judge of the Thirteenth Judicial Circuit, at the LaSalle County Courthouse, 119 W. Madison Street, Ottawa, Illinois.

REPORTED BY:
Paula D. Williams, CSR, RPR
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APPEARANCES:

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Peru, IL

On behalf of the Plaintiff.

MR. LOUIS E. OLIVERO
Attorney at Law
1615-4th St.
Peru, IL

On behalf of the Defendants

(The following proceedings were held in open court.)

THE COURT: This is 95-ED-3, the City of Peru vs. Kotecki. I believe the matter is up today for a Motion for Reconsideration.

MR. OLIVERO: Correct, your Honor.

THE COURT: You filed a response, Mr. Hintz.

MR. HINTZ: I did, your Honor.

THE COURT: I have looked at them. Mr. Olivero, you can proceed on your Motion.

MR. OLIVERO: I believe -- just one second, your Honor. I am trying to find a document. Your Honor, I would call to the Court's attention the exhibits that were offered into evidence, and especially Exhibit Number 2. And in Exhibit Number 2, first of all, the Court is very familiar with this case.

The City filed a complaint for condemnation and there was 2 counts. Count 2 is dismissed because they failed to publish in accordance with the State statute on par lot facilities. And Count I proceeded to a hearing.

And at the close of the hearing the plaintiff made I'm sorry, the defendant made a Motion at the close of the plaintiff's case and again at the close of all the evidence for a directed verdict and previous to that there was a Motion for Summary Judgment that had been argued and
heard.

So the Court, I am sure, is well familiar with the case.

Now the defendants filed a Motion to Dismiss and a Motion to Traverse. And therefore the burden of proof as to the basic issues was on the plaintiff to establish that they had the right to proceed. And they rely in their complaint on the fact that they have an ordinance that was passed and adopted, that was ordinance number 2904 and 2915. And although the plaintiff offered into evidence certain ordinances and other documents, I objected to the admission but they were admitted over my objection.

We are here now on the question of ordinance number 2915. Ordinance 2915 that I asked the Court to reconsider is at the very end, the paragraph, I believe it's section 5 of that ordinance. That ordinance says in section 5, "This ordinance shall be effective immediately from and after its passage and approval and shall be published in pamphlet form."

And the certification that is attached has no reference whatsoever as to its publication in pamphlet form.

Under the law of the State of Illinois, section 65, Illinois

Compiled Statutes, section 5/1-2-6 says that the certification of the clerk is sufficient evidence to prove that the ordinance was published, whether it be by publication in the newspaper or pamphlet form, and however it's done the clerk certification is sufficient to prove that the ordinance was published.

I call to the Court's attention the Exhibit 2 where clearly the City Clerk of the City of Peru has never certified that ordinance number 2915 was ever published.

In my Motion to Reconsider, I assume the Court has read it. It is very specific as to the reason for the purpose of the publication. And the reason for the purpose of the publication is to make sure that if you wanted to go to the a copy of this ordinance, Vol] would get a copy of the ordinance that was published.

I cite to the Court for it's consideration 2 cases, and I have made copies for the Court, as to why the ordinance is invalid and therefore the complaint should be dismissed.

The first is --

MR. HINTZ: Your Honor, I am going to object to the cases. I haven't seen those. They have never been included in his Motion to Reconsider.

THE COURT: Do you have copies for counsel?

MR. OLIVERO: I have just got my copy, but I will give

him the citation and go get the books, your Honor.

MR. HINTZ: Well, I can read it, your Honor.

MR. OLIVERO: I will get you the books. It will take me one second.

THE COURT: Well, why don't you see if you can run a copy. We'll take a break and see if you can run a copy. If you have any other material you're going to cite, we'll take a short break and you can make copies for counsel.

(The Court recessed a short while.)

THE COURT: Let's continue then, Mr. Olivero.

MR. OLIVERO: Thank you, your Honor.

As I indicated to the Court, I filed this Motion in accordance with section 2-1203 of the Code of Civil Procedure because of the fact that ordinance number 2915 was not published. And the ordinance itself calls for publication, as I indicated, in section 5 of the ordinance.

And I told the Court about the certification. It's a matter of record and it's an exhibit, Plaintiff's Exhibit 2. And on its face it doesn't have any reference whatsoever as to any publication on the

part of ordinance number 2915 by the City of Peru.

Since they have the burden of proof and that they have to prove that they have a prima facie case, the failure to prove publication of ordinance 2915 is fatal to this proceeding and that is why I am entitled to a Motion for a Directed Verdict. The ordinance as of this date still has not been published.

I cite for the Court two cases. The first for the Court that I cited was Home Finders, Inc. Vs. City of Evanston. In that case the City of Evanston had an ordinance that realtors would violate by not showing all the houses to any group, I mean to everyone, and not limiting to certain groups, that they could be punished and fined. And there was an allegation that the realtor firm involved in this, which it was entitled Home Finders, Inc., violated the ordinance and they were fined.

There was an appeal, and the meat of the whole case starts on page 789. And starting on the second column it says right there, "The certified copy of the ordinance shows on its face that it was introduced, adopted, and approved on October 9, 1972, but does not show an ate Republication."

And, of course, the ordinance and in the Home Finders h ad the same provision as we had here, that it had to be published.

And at the bottom of that same page it says, "While publication of the amendatory ordinance may not have been required by statute, the fact nevertheless remains that the ordinance itself specifically provided that it was not to become effective until after "publication in the manner provided by law; i.e., by one of the methods specified in section 1-2-4."

And I cited to the Court the Illinois Compiled Statutes section that is involved and I pointed out to the Court the certification of the clerk is sufficient. And the citation in Home Finders was under the old Chapter 24, but it's the same as in the new compiled statutes, that all they need is a certification by the clerk that it was published.

Well, the clerk has never certified that and it was never published. The Court in Home Finders goes on to say on page 790, "As a consequence of plaintiff's challenge to the composition of the board, it was incumbent upon the defendants to prove the amendatory ordinance reducing the required number of board members from 5 to 3 was in full force and effect in accordance with its terms at the time of the hearing."

And that same analogy, reasoning, applies to this condemnation proceeding. The City had to prove that 2915 was in full force and

effect at the time this condemnation proceeding took place. And, of course, as I point out to the Court, it never did publish. And that the right column on page 790 at the top about ten lines down, it says, "Likewise a copy of the ordinance itself shows on its face the date of introduction, adoption, and approval, but gives no indication of the date of publication, which was by the terms of the ordinance a condition to its becoming effective.

Plaintiff's challenge to the composition of the board and its authority to conduct hearings with less than 5 members must therefore be sustained."

And that is what the Appellate Court -- I'm sorry, yes, no, the Supreme Court said in Home Finders vs. City of Evanston, and that is 357 Northeast Second 785, 2 Illinois Decisions 565.

Now the Supreme Court citation is 65 Illinois Second 115. Now the second case I cited to the Court to support my position was County Collector of Kane County vs. American National Bank. And that is another Supreme Court case, 132 Illinois Second 64, 547 Northeast Second 107, 138 Illinois Decisions 138.

In that case the City of Aurora adopted an appropriation ordinance. And they had to, of course, publish that before they could adopt a levy ordinance. And the City of Aurora was operating under the home rule provisions of our state constitution. And after they adopted the appropriation ordinance, they failed to publish and they then went ahead and passed a levy ordinance. And there was a challenge to that levy ordinance as being in violation of the statute and therefore void and unconstitutional because they failed to publish in accordance with the statute.

On page 139 of the Kane County Collector decision on the second column under headnote 1, "This Court has held that before a municipality may validly pass an ordinance levying taxes, it must have first passed an appropriation ordinance which is in full force and effect at the time of the adoption of the levy ordinance. And that to be in full force and effect, there must be publication of the appropriation ordinance followed by a lapse of the specified period of time."

And as I pointed out in this case, they proved that they had failed to do that.

The Supreme Court stated the law with reference to the appropriation ordinance on page 141 saying in section 5 of their ordinance, it's almost identical to section 5 of this ordinance, "that this ordinance shall be in full force and effect from and after its final

passage, approval, recording, and publication, and lapse of time prescribed by law."

And the law is that no appropriation ordinance shall take effect unless there's been 10 days passage before a levy ordinance can be adopted.

Again, on page 141 at the headnotes 2 and 3 in the right lower column, the Supreme Court said, "in construing a statute or an ordinance, a court should not adopt a construction which renders words or phrases in a statute superfluous."

And on page 142 the Supreme Court said, "The City imposed this requirement upon itself, and we must attempt to give meaning to the words and determine what law is referred to in regard to publication."

Further down on 142, the Supreme Court goes on to say, "The plain meaning of section 2-28, which the appropriation ordinance adopts", and that is the section in their home rule provisions, "is that the appropriation ordinance must be published 10 days before it will become effective. Having admittedly failed to do this, the ordinance was not in effect at the time that the tax levy ordinance was passed."

And on the right hand column of 142 about halfway down the Supreme Court said, "By, in the appropriation ordinance, referring to the requirements of its own ordinance requiring notice, the City exhibited an intent to be bound by the procedures for adopting an appropriation ordinance set forth in its own code."

My comment is that that is section 228 they referred to previously.

Continuing on the Supreme Court said, "We do not believe that its home rule powers allow it to ignore valid procedures which it has imposed upon itself."

And on page 143, the Supreme Court said at the bottom of the first column, "The City's failure to comply with the mandatory publication and time-lapse provisions of its appropriation ordinance rendered the ordinance ineffective at the time the City sought to pass its levy ordinance."

Now that is 2 Supreme Court cases setting forth why if the ordinance provides that it has to be passed in accordance with the provisions and published in accordance with its provisions as section 5 of ordinance 2915 of the City of Peru in establishing this downtown redevelopment district and condemnation proceedings and the procedures to be followed, they have failed to publish ordinance 2915 in pamphlet form. And having failed to publish it in pamphlet form,

the ordinance is invalid and the basis of this lawsuit cannot proceed because they have an invalid ordinance and therefore the Motion for Directed Verdict should be allowed.

THE COURT: Thank you, Mr. Olivero. Mr. Hintz.

MR. HINTZ: Well, your Honor, first off I would raise the question of whether or not this Motion to Reconsider is timely.

The Motion for Directed Verdict was reached. The ruling on the Motion for Directed Verdict was reached February 11, your Honor, as reflected by the Court record. And that is what he's trying to do now is to vacate the, your ruling on the Motion for a Directed Finding.

It wasn't until February 20th that we reached a ruling on our Motion in Traverse to Dismiss. So he filed this after 30 days, and I question the jurisdiction regarding the Motion for directed finding.

However, arguing in the alternative, your Honor, respectfully, the cases that Mr. Olivero cites are not on point in this case.

The cases he is citing, we have ordinances in them that impose jurisdictional requirements in the ordinance in order for it to be effective. You have to publish ten days prior to its effectiveness. The ordinance that we're talking about here, 2915, does not require that. The ordinance here requires that the ordinance will be published, will be effective upon it's approval. And then it goes on to say that it will be published in pamphlet form.

Now Mr. Olivero first raises the issues of whether or not the ordinance was published in his Motion to Reconsider. He did not raise it in any of his pleadings. The first time he's raising it is now. Therefore, the City having entered the ordinance into evidence, having been a certified copy of the ordinance, has no duty to go ahead and prove that the ordinance was published in pamphlet form. Especially if Mr. Olivero is never questioning that at the time of the Motion for Directed, Verdict and at the time of the traverse in motion to dismiss.

So, of course, the City doesn't need to prove that it was published at the time because it was never an issue. It was never an issue at the time. I would also point out that the ordinance, the City of Peru ordinance is not -- its effectiveness is not contingent on the fact that the ordinance was published pursuant to its own terms as in these cases that Mr. Olivero is citing. They are apples and oranges and these cases should not be considered.

After the ordinance was admitted into evidence, your Honor, a certified copy of the ordinance, and after the Motion to direct was denied, the burden became on the defendant. The burden shifted to

the defendant after we made our was something that was done not properly. He did not raise it at the time of his Motion in traverse to dismiss.

He did not raise it in his Motion for Directed Finding. And, therefore, the City of Peru had no need to go ahead and approve that the ordinance was publish in pamphlet form.

In point of fact, the ordinance was published in pamphlet form. But because it was not an issue, I did bring up any evidence regarding that. It had already been entered into evidence, the certified copy of the ordinance.

There is no question the ordinance was published in pamphlet form. Mr. Olivero could go down there today and pick up a copy of the ordinance in pamphlet form. It's been like that ever since -- that is how the procedures are.

As soon as the ordinances are passed they are -- and if the ordinance is required to be published in pamphlet form, they are made copies available for any members of the public who want to come by and pick them up.

That's the procedure that the clerk has been using since the beginning of the City of Peru. So as far as now raising this issue about the fact that the ordinance cannot be published is really unfair because it was not raised during the course of the trial. It was not raised during the course of the Motion to Dismiss and Traverse. It was not raised at the Motion for Directed Verdict. So it's something that was a non-issue at the time and now he's raising it for the first time, Judge, and I believe that his Motion to Reconsider should be denied.

MR. OLIVERO: Thank you.

THE COURT: Let me just ask you the point Mr. Hintz raised and maybe you can respond to this.

I mean do you see a difference in the language in section 5 here where it says, "This ordinance shall be effective immediately from and after its passage and approval and shall be published in pamphlet form"?

Is that different than saying this ordinance -- let me see where it says -- this ordinance shall be in full force and effect from and after its final passage, approval, recording, and publication?

MR. OLIVERO: No difference whatsoever.

THE COURT: You don't see there's any difference there?

MR. OLIVERO: None.

Your Honor, that's why the Supreme Court said no words are

superfluous. And I think the Supreme Court is the final say on how to interpret a statute or an ordinance. First of all, to respond to the question of timeliness, your decision was not rendered until February --

MR. HINTZ: The 20th.

MR. OLIVERO: The 20th. THE COURT: Right.

MR. OLIVERO: So when he talks about February 11, your ruling never came down until February 20th. And, of course, we have the time within 30 days to file in accordance with section 2-1203 of the Code.

So his argument, of course, doesn't hold any water on that regard.

Now as to regard to the ordinance. We challenge the ordinance initially. We filed a Motion to Traverse and that meant the law is, and there's a myriad of cases on the point in condemnation cases. When a defendant files a Motion to Traverse, that is the only pleading he necessarily has to file. Because then the burden, as the case law has held, is upon the condemnor to prove he has the right to do what he is asking to be done. And in this case he's asking to condemn this property and he's basing it on an ordinance that is completely invalid.

And Mr. Hintz saying that they have no need to prove. Maybe I missed out on something through the years, but the law as I was obviously taught in law school and from experience is the burden is upon the claimant to prove his case. And the defendant just has to object. And if it doesn't get in, that is the claimant's problem.

They have got to figure out how to prove their case to make a prima facie case. And it's not unfair because whenever there is an unconstitutional provision or an invalid ordinance, you can raise that all the way up and even in the Supreme Court on appeal that they didn't have the right to do it for the very first time.

Well, I am not raising it on appeal. I am still raising it in the trial court when it's fresh in the trial court's mind. And all the evidence is here that the fact that under 2-1203 I do have the right to point out to the Court some of the information that has come to light. That's why I cite to the Court the statute.

The statute in the State of Illinois says to make it simple for the city clerks and village clerks throughout the whole State of Illinois, rather than call the clerk in and put her under oath to prove up a case, the legislature enacted section 65 I.L.C.S. 5/1-2-6, proof of contents of ordinances.

And all the City Clerk has to do is give a certified certificate

saying the ordinance was passed, adopted and published on a certain day. And if you look at the certificate to ordinance 2915, there is nothing.

THE COURT: All ordinances don't have to be published, do they?

MR. OLIVERO: No, no, no.

THE COURT: You're only saying if they put the requirement in themselves.

MR. OLIVERO: Or if the statute, which is a fine or an appropriate, that's right in the statute.

THE COURT: Right.

MR. OLIVERO: When they put that in like they did here--

THE COURT: That's the basis for the need for publication.

MR. OLIVERO: Correct.

THE COURT: I want to understand your argument. The reason you're arguing they had to publish this is because of paragraph 5.

MR. OLIVERO: Correct. That's why I cited the statute. And in my research I found the 2 cases, and both of which are Supreme Court cases.

As I indicated, the Supreme Court has clearly said that nothing, and I believe one of those two was written by Justice Ryan. It was the Kane County case that Justice Ryan wrote, and that's a 1989 Supreme Court case, pretty fairly recent.

And, again, I repeat, "In construing a statute or an ordinance, a court should not adopt a construction which renders words or phrases in a statute superfluous."

They were trying to argue that same argument in the City of Aurora case as they are trying to do now. That you don't have to follow, even though you say we have to publish it, you don't have to follow it.

I don't know how clear we can be and how clear the evidence can be is that in this case the ordinance was never published and it's void.

THE COURT: Okay.

The motion for Reconsideration which was filed in this case and the argument here today centers around the issue of whether or not ordinance number 2915 is a valid ordinance because it wasn't published and it was required to be published.

The City has raised a couple of objections.

First of all, they are objecting to the Court's jurisdiction.

The Court finds it has jurisdiction to reconsider a ruling that

was made on February 20th because this was filed within 30 days thereafter. And the Motion itself, the Motion for Reconsideration expressly talks about the Court reconsidering it's February 20th ruling. So the Motion is timely filed and the Court does have jurisdiction to proceed and to rule on the merits of the Motion.

Now as a general rule, there is -- let's start back a little bit.

This is not like a criminal case where someone is charged with a crime, can sit moot, and the State has to prove all the elements of the offense beyond a reasonable doubt.

This is a civil proceeding. And in this particular case the State filed a petition to condemn property by using the eminent domain powers.

The defendant filed a traverse. The defendant's traverse, which was filed on April 3, 1996, is 8 pages long and contains in detail the objections that are being made by the Koteckis and why in their opinion the City has exceeded its authority in attempting to proceed with this condemnation action.

Nowhere anywhere in there is there any allegation that the ordinance is invalid because it wasn't published and it was required to be published.

The defendant filed a detailed Motion for Summary Judgment in January of 1997, setting forth the legal points and authorities on which it relied in the, in its continued claim, which is asserted vigorously throughout these proceedings that the City had no authority to condemn this property.

Nowhere in that Motion is there any claim that the ordinance is invalid because it was not published.

There were Motions for Directed Verdicts made, arguments made. That argument was never raised.

To my recollection regarding the publication of the ordinance, my recollection when ordinance, Plaintiff's Exhibit Number 2 was admitted, there was no objection that it represented the ordinance that was passed. Nothing was said that it wasn't published and it was an invalid ordinance because it wasn't published.

It was argued it isn't valid because it was unconstitutional and it exceeded the authority of the City and that it was vague and there were a lot of other arguments made.

Now you disagree with that. You feel publication was raised sometime during this trial?

I saw you raise your hand. I don't want to cut you off.

MR. OLIVERO: Your Honor, in my argument I did mention it.

But I thought I had a better argument on the constitutionality and I concentrated on that. But you denied me there, so I had to come back and call the Court's attention.

THE COURT: During the trial?

MR. OLIVERO: No, in my argument on the Motion.

THE COURT: Your closing argument.

MR. OLIVERO: Yes.

THE COURT: Now, as I stated, I don't think that that is a criminal case where the City has to figure out every possible thing it has to prove and put it in.

When the defendant raises certain issues and sits silent on others and the City says here's our ordinance, we agree that's the ordinance and we're challenging its constitutionality, we're challenging the fact that it's vague, and we're not saying anything about publication. Nobody says anything about it. There is an issue of waiver when you get after the trial is over 30 days later, by the way, they should have proved that it was published. So the Court finds that.

Second of all, and this is the most important finding. I don't think this ordinance on its face requires to be published. I think the ordinance says it shall be effective immediately from and after its passage and approval. That is one clause.

And shall be published in pamphlet form. It doesn't say it's not effective until it's published.

Now if there were commas in there instead of that extra and, it would say effective immediately from and after its passage, approval, and publication.

That is the language we are talking about in the Supreme Court cases cited that are being to me today. That's not what this says.

It says, "This ordinance shall be effective immediately from and after its passage and approval and shall be published in pamphlet form. It doesn't say it's not going to be effective until after it's published.

So I am going to deny the Motion.

In addition to that, I mean there's been a representation here made that it was published. And to go along with my finding that there's been a waiver, I am not going to require the City because I am going to deny the Motion to Reconsider, but if the City wishes to supplement the record with evidence that it was indeed published in light of the fact that it was never argued, never made an issue in any of the pleadings, never raised at the trial in any evidentiary way, I will allow the City for the sake of completion of the record to supplement

the record if it wishes to do so since they are making an allegation and they have alleged in their response it was indeed published. I don't know if you want to do that.

MR. HINTZ: I think in case this case goes up on appeal, I think it will be interesting.

THE COURT: I will give you leave to call a witness and let Mr. Olivero know if you wish to do that offer of proof. Let him know who you are going to call so he has a chance to see what you're going to be presenting ahead of time. And, you know, you can come in here. We have some time until we get this all resolved. But you can notice that up at an appropriate date and get a date that is convenient from the clerk.

If you want to put some evidence on then, you can do it. But the Motion for Reconsideration is denied based on waiver and also on the fact my interpretation of that language doesn't require that it be published before it is effective.

Where are we now? We can go off the record.

MR. OLIVERO: May I just make one comment?

THE COURT: Sure.

MR. OLIVERO: Your Honor, I agree that I, you know, can only argue. I don't have any opportunity to put any evidence unless they do and I think that is correct.

If they think they have a valid ordinance, they thought that's right, because I was going to make the suggestion. But you have already given them the opportunity and they said they are going to do it.

But aside from all that, you have here a statute, as I cited to the Court, that makes it so easy that they don't have to bring in all this burdensome work and all they have to have is a certification. And now they are going to have to impeach their own certification because the
certification by the City Clerk says nothing as to being published.

THE COURT: It doesn't say anything. I don't know if they are impeaching it. They are going to show that it was -- apparently, according to the representation, they are going to show it was published in pamphlet form, which is what it said in the ordinance had to be done.

MR. OLIVERO: That's all the certification would require if it had been done as to say it was published.

THE COURT: You don't care if they bring in a witness in? You'll just take a certification from the clerk?

MR. OLIVERO: Oh, no.

THE COURT: I am not going to tell them what to present. This is in the nature of an offer of proof. I have denied your Motion and they don't have to present anything if they don't want to. But if they want to, just in case because it's their record, if they want to -- because I agree with you. They did not present any evidence at the hearing that the ordinance had been published.

MR. OLIVERO: Correct.

THE COURT: All right. That is true. And I'm denying your Motion because I don't think they had to because I think for two reasons.

First, I believe it was waived because it was never asserted as an issue by the defense that the ordinance had any invalidity because of a failure of publication. They were never put on notice that was an issue.

The fact that the argument was made, they could have been lulled the other way if they introduced it here and presented it in evidence and the only thing argued about its constitutionality and vagueness.

And, second, I don't believe the ordinance on its face requires for it to be valid that it be published.

Now those are my findings and I know you disagree with them. But even in spite of those findings, I am going to give them an opportunity if they wish to do so. They don't have to -- to make an offer of proof regarding whether or not it was published.

If they do decide to do that, I certainly would give you the opportunity to rebut it or present some evidence to the contrary. That would just be in the nature of an offer of proof.

If they decide to forget about it, we're done on that issue and the record will have to stand on the way it is right now.

MR. OLIVERO: The only other point, I don't have the cases off the tip of my thumb. But they are legion that you can challenge an ordinance even in the Supreme Court after you have briefed it all and all of a sudden it comes up that it is unconstitutional or invalid.

How can you have a ruling on an invalid subject matter? That's why it was one of my arguments.

THE COURT: I understand your argument.

Now let's go off the record for a second.

(Whereupon the proceedings were concluded.)

STATE OF ILLINOIS)
)
COUNTY OF LASALLE)

I, Paula D. Williams, an Official Court Reporter in the Thirteenth Judicial Circuit of the State of Illinois, County of LaSalle, do hereby certify that I reported in machine shorthand the proceedings had in this cause; that I thereafter caused the foregoing to be transcribed into text, which I certify to be an accurate transcription of my shorthand notes of the proceedings in this cause had before JAMES A. LANUTI, Judge of said court.

/S/ Paula D. Williams
Paula D. Williams, CSR, RPR
Official Court Reporter

Dated this 5th day
of May, 1997.

N.

The unpublished order issued by the Appellate Court of Illinois, Third District, on May 27, 1998, was delivered by the Honorable Thomas J. Homer, Presiding Justice, with the Honorable William E. Holdridge, Justice, and the Honorable Kent Slater, Justice, concurring therein. The aforementioned order provides as follows:

3-96-0170
City of Peru v. Kotecki

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord One Thousand Nine Hundred and Ninety Eight, within and for the Third District of Illinois:

Present -

HONORABLE THOMAS J. HOMER, Presiding Justice x
HONORABLE WILLIAM E. HOLDRIDGE, Justice x
HONORABLE KENT SLATER, Justice x
HONORABLE PEG BRESLIN, Presiding Justice

HONORABLE TOM M. LYTTON, Justice
HONORABLE JUDITH E. KOEHLER, Justice

GIST FLESHMAN, Clerk

BE IT REMEMBERED, that afterwards on
May 27, 1998 the Opinion of the Court was filed in the Clerk's Office of said court, in the words and figures following viz:.

No. 3-97-0625

IN THE APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 1998

CITY OF PERU, an Illinois Home Rule Municipal Corporation, Plaintiff-Appellee, v. DONALD E. KOTECKI and TRACY L. KOTECKI, Defendants-Appellants, and EUREKA SAVINGS BANK; UNKNOWN HEIRS AT LAW OR DEVISEES OF WILLIAM A. EAKIN, UNKNOWN OWNERS and NONRECORD CLAIMANTS, Defendants.	Appeal from the Circuit Court for the 13th Judicial Circuit LaSalle County, Illinois No. 95--ED--3 Honorable James A. Lanuti Judge Presiding

ORDER "NOT TO BE PUBLISHED"

The City of Peru filed a complaint to acquire certain real estate by condemnation located in the downtown business district. The defendant owners of the property filed a traverse, raising several constitutional issues and challenging the necessity and public purpose of the taking. The trial court denied the defendants' motion for summary judgment and subsequently denied the traverse. The defendant owners appeal. For the reasons that follow, we affirm.

FACTS

The City of Peru by the city council and the mayor engaged a consulting firm, Pekham, Guyon, Albers and Viets, Inc. (PGAV) to determine if there was a need to redevelop its downtown business district. After receiving PGAV's report, the city enacted ordinance 2904 which created the Business District Development and Redevelopment Commission (commission). Following public hearings, the commission produced a plan to redevelop the downtown business district. The plan stated that additional parking was

necessary as was the reconfiguration of existing parking lots to facilitate shopping and delivery of goods and materials. The plan also suggested certain property be acquired including the subject property owned by the defendants. The defendants purchased the subject property as an investment and it is currently being used as office space.

Later, upon the recommendation of the commission, the city council enacted ordinance 2915 entitled "An Ordinance Establishing the Boundaries of, and Adopting a Business District Development and Redevelopment Plan for the Downtown Business District of the city of Peru, Illinois." The commission conducted a hearing regarding the taking of the defendants' property. After the hearing, the commission recommended that the city council enact an ordinance to authorize the taking of the defendants' property by eminent domain. The city council passed ordinance 3238 which authorized that acquisition.

The city filed a complaint for condemnation against the defendants. The defendants filed a traverse and a motion for summary judgment. The summary judgment motion was denied, and the court held a hearing on the traverse. The city presented witnesses and entered ordinances 2904, 2915 and 3238 into evidence. A motion for directed finding by the defendants was denied by the court with the court finding that the statute was not unconstitutional, the ordinances were not unconstitutional, that none of the processes were unconstitutional, and that the city made a *prima facie* showing of "reasonable necessity." After the defendants presented witnesses, the court ruled in favor of the city. The defendants' petition to reconsider was denied.

On appeal, we must decide whether the city's ordinance 2915 was required to be published prior to becoming effective; whether the taking meets the public purpose and necessity requirements; and whether the city's ordinances and section 11--74.3--3 of the Illinois Municipal Code (Municipal Code) (65 ILCS 5/11--74.3--3 (West 1994)) are constitutional.

ANALYSIS

Publication of the ordinance

The defendants argue that ordinance 2915, which enacted the city's redevelopment plan for the central business district, is void because the city failed to publish the ordinance in pamphlet form as required by various state statutes and by the ordinance itself. Construction of ordinances and statutes are undertaken by this court *de novo*. *Makowski v. City of Naperville*, 249 Ill.App.3d 110, 617

N.E.2d 1251 (1993). The primary rule of statutory construction is to ascertain and give effect to the intention of the legislature, and that inquiry begins with the language of the statute itself. *Solich v. George and Anna Portes Cancer Prevention Center of Chicago, Inc.*, 158 Ill.2d 76, 630 N.E.2d 820 (1994). Courts apply the principles of statutory construction to ordinances. *City of Rolling Meadows v. Kyle*, 145 Ill.App.3d 168, 494 N.E.2d 766 (1986).

Section 5 of the ordinance states: "This Ordinance shall be effective immediately from and after its passage and approval and shall be published in pamphlet form." The question is whether section 5 requires the ordinance to be published in pamphlet form before becoming effective. We find that the defendants' interpretation of the ordinance is incorrect. Section 5 does not state that the ordinance's effectiveness is contingent upon its publication. To the contrary, the plain language of the section provides the ordinance is to take effect immediately upon its passage and approval. Therefore, we conclude that section 5 of the ordinance does not require publication as a condition precedent which must be met prior to the ordinance becoming effective.

Next, the defendants contend that section 11--139--l, et seq., of the Municipal Code (65 ILCS 5/11--139--l,.et seq. (West 1994)) requires publication in the instant case either directly or by analogy. We disagree. The specific provision cited by the defendants, section 11--139--5, does not address publication. While section 11--139--6 provides publication requirements, that section does not apply to ordinance 2915 because division 139 of the Municipal Code covers waterworks and sewer systems which are not the subject of ordinance 2915.

The defendants also cite sections 1--2--4, 1--2--5, and 1-2--6 of the Municipal Code (65 ILCS 5/1--2--4, 5/1--2--5, and 5/1--2--6 (West 1994)), asserting that these three sections aid in understanding why the city's ordinance 2915 is invalid. However, the defendants' reliance on these provisions is misplaced.

Section 1--2--4 does not require the publication of the ordinance in the instant case. That section provides, inter alia, that "[a]ll ordinances of cities, villages and incorporated towns imposing any fine, penalty, imprisonment, or forfeiture, or making any appropriation, shall (1) be printed or published in book or pamphlet form, published by the authority of the corporate authorities, or (2) be published at least once, within 30 days after passage, in one or more newspapers (Emphasis added) 65 ILCS 5/1--2--4 (West 1994).

In *Hallstrom v. City of Rockford*, 16 Ill. 2d 297, 157 N.E.2d 23 (1959), the Illinois Supreme Court rejected the argument that an ordinance condemning land for the extension of a street was invalid because the plat, which described the land and was incorporated by reference into the ordinance, was not published. The court stated the statute relied upon, Ill. Rev. Stat. ch. 24, para. 10-3 (1957), the predecessor to 65 ILCS 5/1--2--4 (West 1994), did not apply because the ordinance did not impose any fine, penalty, imprisonment, or forfeiture, or make any appropriation. Similarly, the instant ordinance does not impose a fine, penalty, imprisonment, forfeiture or require the making of an appropriation. Therefore, section 1--2--4 does not apply.

Similarly, section 1--2--5 does not require the publication of the ordinance in the instant case. That section provides, *inter alia*:

> "The municipal clerk shall record, in a book used exclusively for that purpose, all ordinances passed by the corporate authorities. Immediately following each ordinance the municipal clerk shall make a memorandum of the date of the passage and of the publication or posting, where required, of the ordinance. This record and memorandum, or a certified copy thereof, shall be *prima facie* evidence of the contents, passage, and of the publication or posting of ordinances." (Emphasis added.) 65 ILCS 5/1--2--5 (West 1994).

This provision sets forth the procedures for the recording of newly passed ordinances by the municipal clerk. The section does not mandate publication in all instances but only requires clerks to include in their memoranda the dates of publication or posting in instances in which publication or posting is otherwise required by law.

Finally, section 1--2--6 does not require the publication of the ordinance in the instant case. That section provides, *inter alia*:

> "The contents of all municipal ordinances, the date of passage, and the date of publication or posting, where required, may be proved by the certificate of the municipal clerk, under seal of the corporation.
>
> Whenever municipal ordinances are printed in book or pamphlet form, and purport to be published by the authority of the corporate authorities, such book or pamphlet shall be *prima facie* evidence of the contents, passage, and legal publication of such ordinances, as of the dates mentioned in such book or pamphlet, in all

courts and tribunals." (Emphasis added.) 65 ILCS 5/1-2--5 (West 1994).

This section provides that the contents and the date of passage and date of publication or posting of municipal ordinances may be proven by the certificate of the clerk under seal. The dates allowed to be proven include the date of publication or posting in instances in which publication or posting is otherwise required. In addition, the section provides that in instances in which an ordinance is published in book or pamphlet form by the corporate authorities, the book or pamphlet shall be prima facie evidence of the contents, passage and legal publication of the ordinance. The section in no way mandates publication of ordinance 2915 as asserted by the defendants in the instant case.

We find that the defendants have failed to establish that the city's failure to publish ordinance 2915 rendered it ineffective.

Public Purpose and Necessity Requirements

The defendants argue that the condemnation should not be allowed because it is not for a public purpose but was brought to benefit private businesses. A four-part test has been used to determine whether a particular use constitutes a public use of property. In *Department of Public Works and Buildings v. Farina*, 29 Ill.2d 474, 194 N.E.2d 209 (1963), the Illinois Supreme Court cited the following factors used to determine whether purposes were public: (1) it affects the community as distinguished from an individual; (2) the law controls the use to be made of the property; (3) a title so taken is not vested in a person or corporation as a private property to be used and controlled as private property; (4) the public reaps the benefit of public possession and use and no one can exercise control except the municipality. *Farina*, 29 Ill.2d at 479, 194 N.E.2d at 212. In *Farina*, the court stated that the determination of whether a use is public is accomplished on a case-by-case basis. See *Farina*, 29 Ill.2d at 479-80, 194 N.E.2d at 213. The trial court's determination of whether a use is public will not be reversed unless it is against the manifest weight of the evidence. *Alsip Park District v. D. & M. Partnership*, 252 Ill.App.3d 277, 625 N.E.2d 40 (1993).

First, we consider whether the purpose of the condemnation affects the community or an individual. The defendants argue that the only purpose for the parking lot expansion for which the city seeks the condemnation of the defendants' property is to facilitate truck deliveries to private businesses. However, the city argues that the evidence is overwhelming that the condemnation is for a public

purpose. We agree with the city's position.

The legislature has determined that redevelopment of a business district is a public purpose by passing the Business District Development and Redevelopment Division of the Municipal Code, 65 ILCS 5/11--74.3--1 et seq (West 1994). The city presented evidence that the condemnation is part of the redevelopment of the central business district. In addition, the city established through testimony and other evidence presented that the additional parking will be needed once the alley and parking lot are modified to alleviate the difficulties of truck deliveries and safety problems which exist as a result of the current configuration of the parking lot and alley. The evidence established that the reconfiguration of the alley and the parking lot was for public safety purposes, as well as to support local businesses. Testimony of the witnesses and other evidence in the record indicate that the main focus of the plan was to benefit the community, as distinguished from an individual, and consequently this factor favors the city.

Second, we address whether the law controls the use to be made of the subject property. The property is to be used as a city parking lot and the nearby alley will be widened by the city. State statute gives the corporate authorities of municipalities the power to license and regulate parking lots (65 ILCS 5/11--42--12 (West 1994)), and the power to locate and regulate the construction of parking lots (65 ILCS 5/11--42--8 (West 1994)). The law clearly controls the use of the property, and this factor favors the city.

Third, we consider whether the title of the property taken is vested in a person or corporation to be used as private property. The record reflects that the parking lot will be a municipal lot with title vested in the city in fee simple. Nevertheless, the defendants argue the businesses being served are private businesses and as a result, the property will be used as private property. However, a purpose may be highly beneficial to private interests as well as to the public interest and still constitute a public use. See *Farina*, 29 Ill.2d at 480, 194 N.E.2d at 213. Consequently, this factor favors the city.

Fourth, we consider whether the public reaps the benefit of public possession and use and no one can exercise control except the municipality. In the instant case, the public benefits from the use of the property through its use as public parking, and the increase in safety resulting from the reconfiguration of the current parking lot and alley. The city controls both the use of the parking lot and the alley and this factor favors the city.

We conclude that the taking of the defendant's property for the reconfiguration of the parking lot confers a benefit to the general public and is not an abuse of the city's power of eminent domain. As a result, we find that the determination of the trial court on this issue was not against the manifest weight of the evidence.

Next, the defendants assert that the existence of "necessity" is crucial in an eminent domain case, and no proof has been offered that a necessity existed requiring the taking of the defendants' property. They argue the present parking is sufficient, and no studies of need were completed. Furthermore, they assert the plan results in four less public parking stalls.

In general, where the legislature has delegated to a corporation the authority to exercise the power of eminent domain, the corporation also has the authority to decide the necessity for exercising the right, and its decision will be conclusive absent a clear abuse of power granted. *City of Chicago v. Vaccarro*, 408 Ill. 587, 597, 97 N.E.2d 766, 771 (1951). The condemnor has the burden of proof to establish necessity. *People ex rel. Director of Finance v. Young Women's Christian Association of Springfield*, 86 Ill.2d 219, 235, 427 N.E.2d 70, 77 (1981).

In *Young Women's Christian Association of Springfield*, the court acknowledged that a recitation of necessity contained in the resolution of the proper body would establish a prima facie case of necessity. It is then the duty of the defendant to advance evidence that there was an abuse of discretion by the governing body. *Young Women's Christian Association of Springfield*, 86 Ill.2d at 235, 427 N.E.2d at 77-8. The determination of the trial court will not be reversed unless against the manifest weight of the evidence. *Trustees of Schools of Township 37 v. First National Bank of Blue Island*, 49 Ill.2d 408, 274 N.E.2d 56 (1971).

In the instant case, ordinance 3238 providing for the acquisition of the defendants' property was adopted by the city council and approved by the mayor, and the city subsequently filed its complaint for condemnation. Ordinance 3238 specifically states that the condemnation is necessary to provide adequate parking for development and redevelopment purposes and adequate access for existing and potential development in the business district. The ordinance further states that the city council has determined that it is necessary to acquire the real estate described in its redevelopment plan for parking lot expansion.

In support of their contention that the taking was unnecessary,

the defendants essentially argue that the city possesses excessive and substantial real estate holdings for public parking within the business district redevelopment area. They also point to testimony that the plan did not increase the total availability of the number of parking stalls.

However, the city offered testimony of the city engineer that the reconfiguration of the parking lot would alleviate traffic safety problems on nearby Peoria Street and allow safer and easier access for trucks unloading in the area. He testified that the plan called for a wider alley for truck traffic flow and a separation of the passenger car parking from the truck lanes. He also testified that after reconfiguration of the truck delivery lane there would be a loss of parking spaces for passenger cars and it would then be necessary to increase that space by condemning the defendants' property.

The mayor also testified that there was a problem with the current configuration of the parking lot. He testified that it was difficult for people to use the parking lot when the semi-tractor trailer trucks are blocking the alley and unloading to the businesses. He stated that it is a dangerous operation to maneuver trucks in the lot and that the trucks occasionally hit the buildings in passing through the alley. He was also concerned that it was dangerous for the people crossing the alley going to the stores.

A licensed truck driver, who also served as a city alderman, was called as a witness by the city. He testified that he had driven his semi-tractor trailer approximately one dozen times into the parking lot to pick up goods. He explained that it was difficult to maneuver his truck into the current parking lot because cars back out of the parking spots and people walk behind his trailer.

The defendants have not established that the city abused its power by deciding a necessity existed to take the defendants' property. We find that the determination of the trial court on this issue was not against the manifest weight of the evidence.

Claims of Constitutional Violations

The defendants raise contentions claiming two of the city ordinances involved in the instant case and a state statute are unconstitutional. This court reviews constitutional challenges to ordinances and statutes *de novo*. *Bank of Waukegan v. Kischer*, 246 Ill.App.3d 616, 616 N.E.2d 624 (1993).

First, the defendants contend that the city unconstitutionally delegated its power and authority. The defendants point out that ordinance 2904 which created the commission was adopted after PGAV was authorized to create a downtown master plan. The

defendants contend that the creation of a commission after PGAV was authorized to create the downtown master plan amounted to an unconstitutional delegation of authority. The defendants argue that because of this unconstitutional delegation of authority, the city did not have the authority to take the defendants' property since the redevelopment plan, the recommendations of the commission for approval of that plan, the enactment of 2904, and the enactment of 2915 do not provide a basis for the city to exercise the power of eminent domain.

An improper delegation of legislative power consists of an attempted grant of some traditional legislative power or authority to an administrative agency or private entity. *People v. Waisvisz*, 221 Ill. App.3d 667, 582 N.E.2d 1383 (1991). While legislative bodies often undertake studies to determine what course of action should be taken, it is well established that no formal study is necessary prior to legislative action (*Triple A Services, Inc. v. Rice*, 131 Ill.2d 217, 234, 545 N.E.2d 706, 713 (1989)).

The record reflects that the Peru city council and the mayor authorized the study and the preparation of the plan by PGAV. The city then established the commission by ordinance once it was determined there was a need for the redevelopment commission. The city needed no formal study prior to passing the ordinance establishing the commission. Public hearings were then held by the commission prior to the adoption of the redevelopment plan by ordinance 2915. Subsequently, the city passed ordinance 3238 authorizing the acquisition of the defendants' property by
eminent domain. We find legislative authority was not improperly delegated by the city council.

Next, the defendants argue that 2904 and 2915 do not contain standards by which individuals can understand the meaning or application of the ordinances. The defendants assert that the ordinances are incomplete, vague, indefinite and uncertain. They assert that they did not have any knowledge as to why their parcel was chosen, and as a result, they argue the ordinances violate due process guarantees. We disagree.

The defendants rely upon *City of Wheaton v. Sandberg*, 215 Ill.App.3d 220, 574 N.E.2d 697 (1991). However, *City of Wheaton* is readily distinguishable from the instant case. In that case, the ordinance at issue was based upon the authority of the home rule provision of the Illinois Constitution rather than the Business District Development and Redevelopment Division of the Municipal Code (65

ILCS 5/11--74.3--3(2) (West 1994)) relied upon in the instant case. In addition, the ordinance in City of Wheaton provided its own criteria for determining whether an area was blighted including the existence of vacancies in all or part of a building. The court determined the language was overly broad, vague, unclear and not rationally related to the end sought to be achieved by the ordinance, since vacancy alone cannot necessarily mean that an area is blighted. We do not find City of Wheaton persuasive authority in the instant case.

An ordinance violates due process guarantees when its terms are so incomplete, vague, indefinite and uncertain that men and women of ordinary intelligence must necessarily guess at its meaning and differ as to its application. See *City of Wheaton*, 215 Ill.App.3d 220, 574 N.E.2d 697. A legislative act which is so vague, indefinite and uncertain that the courts are unable, by accepted rules of construction, to determine, with any reasonable degree of certainty, what was intended will be declared void. *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill.2d 389, 515 N.E.2d 1222 (1987).

The defendants' claim that the ordinance 2904 creating the commission contains vague factors for condemnation must be rejected. Ordinance 2904 merely created the commission to investigate the necessity of whether a redevelopment plan should be adopted by the city. Ordinance 2915, which actually adopted the redevelopment plan, identifies the properties targeted by the city for its redevelopment plan by establishing the boundaries of the redevelopment area. The plan referred to in ordinance 2915 also identified which properties were considered necessary to accomplish the redevelopment plan, and the plan contains a map identifying the properties that could be acquired by the city. Subsequently, ordinance 3238 authorized the acquisition of the defendants' property by condemnation. Ordinance 2915 expresses the intent of the city council to establish a business district and redevelopment plan in compliance with state statute (65 ILCS 5/11-74.3-2 (West 1994)). Consequently, we hold that ordinances 2904 and 2915 did not violate due process in the instant case.

Next, the defendants claim section 11--74.3--3 of the Municipal Code (65 ILCS 5/11--74.3--3 (West 1994)) is unconstitutional. This provision is contained in the Business District Development and Redevelopment Division (65 ILCS 5/11-74.3--1 et seq. (West 1994)). Section 11--74.3--3 enumerates the powers a municipality shall have in carrying out a business district development or

redevelopment plan. The defendants argue that the section violates due process because it contains no standards under which a governmental entity seeking condemnation of a particular parcel of real estate must conform, and that each municipality cannot set its own standards for condemnation proceedings.

In the instant case, the city is exercising its powers under the Business District Development and Redevelopment Division (65 ILCS 5/11--74.3--3(2) (West 1994)) which allows municipalities to exercise eminent domain powers for the acquisition of property for the purpose of a development or redevelopment project. It is well established that the exercise of eminent domain power is a right which may be delegated and applied with discretion unless clearly abused. See *South Park Commissioners v. Livingston*, 344 Ill. 368, 176 N.E.2d 546 (1931). Consequently, the defendants' challenge to the Business District Development and Redevelopment Division must fail.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of LaSalle County is affirmed.

Affirmed.

HOMER, P.J., with HOLDRIDGE and SLATER, JJ., concurring

STATE OF ILLINOIS,)
APPELLATE COURT,) ss.
THIRD DISTRICT,)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I have set my hand and affix the seal of said Appellate Court at Ottawa, this 21th day of May in the year of our Lord one thousand nine hundred and ninety-eight.

/S/ Gist Fleshman
Clerk of the Appellate Court

O.

The order issued by the Appellate Court of Illinois, Third District, on July 13, 1998, denying Defendants' Petition for Rehearing provided as follows:

STATE OF ILLINOIS
THIRD DISTRICT APPELLATE COURT

GIST FLESHMAN
Clerk of the Court
(815) 434-5050

1004 Columbus Street
Ottawa, Illinois 61350
TTD 815 434-5068

Be it remembered, That to wit: On the 13th day of July, 1998, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

33-97-0625
City of Peru,
Appellee,
v.
Donald E. Kotecki & Tracy L. Kotecki,
Appellants,
and
Eureka Savings Bank, et al.,
Defendants.

APPEAL FROM:
LaSalle County
Hon. James Lanuti
95 ED 3

Now on this day this cause coming on for hearing upon the petition for rehearing filed by the Appellants, herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is ordered by the Court that said petition for rehearing be and the same is hereby overruled and denied.

/S/ Gist Fleshman
Clerk of the Court

P.

Order entered on October 6, 1998, by the Illinois Supreme Court provides as follows:

86048

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

October 6, 1998

Mr. Louis E. Olivero
Attorney at Law
1615 Fourth St.
Peru, IL 61354

No. 86048 - City of Peru, etc., respondent, v. Donald E. Kotecki et al., petitioners. Leave to Appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28 1998.